

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

Robert McGee, et al.,	.	Docket #08-CV-520 (MLC)
	.	
Plaintiffs,	.	
	.	United States Courthouse
vs.	.	Trenton, New Jersey
	.	April 16, 2012
STIHL Incorporated, et al.,	.	10:09 p.m.
	.	
Defendants.	.	

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TRANSCRIPT OF DAUBERT HEARING  
BEFORE THE HONORABLE MARY L. COOPER  
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

For The Plaintiff:	Barry M. Packin, Esq Nagel Rice, LLP 103 Eisenhower Parkway Roseland, NJ 07068
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For the Defendant:	James Walsh, Esq. McGuire Woods, LLP One James Center 901 East Cary St. Richmond, VA 23219
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1 THE COURT: Good afternoon everyone.

2 ALL: Good morning.

3 THE COURT: Okay, we'll begin by taking appearances.

4 MR. PACKIN: Good morning, Your Honor. Barry Packin  
5 from the law firm of Nagel Rice representing the Plaintiffs  
6 McGee.

7 MR. WALSH: Jim Walsh from the law firm of McGuire  
8 Woods representing Stihl.

9 MR. RUDOLPH: Good morning, Your Honor. Steve  
10 Rudolph, Rudolph and Kayal, local counsel for Stihl.

11 THE COURT: All right, thank you. Be seated. I  
12 have spent as much time as I physically could going over the  
13 materials filed with this particular motion. Unfortunately, I  
14 was not able to get to all 14 hours of Dr. Castro's deposition  
15 simply because it just didn't occur to me that it could have  
16 been a 14-hour affair, and nor have I read the corresponding  
17 amount of material for the Stout case in which Dr. Kalsher  
18 evidently was deposed at comparable length. But I am very  
19 conversant with what is going back and forth in the issues  
20 here. I have reread the briefs, I have reread the expert  
21 report. I'm aware of the credentials. I have read two of the  
22 three days of the depositions, and I have read the tail-end of  
23 the third day of deposition when counsel for Oldham asked two  
24 questions and Mr. Packin asked one question.

25 I gave the opportunity for this hearing basically at the

1 Plaintiff's request so that the Plaintiff could put something  
2 on the record about the expert and his qualifications before I  
3 decide this motion. I do think that we can accomplish putting  
4 this hearing on the record today. Is Oldham still in the  
5 case?

6 MR. PACKIN: No, Ma'am.

7 THE COURT: Okay, fine. So Mr. Packin, how long do  
8 you propose to go with your witness?

9 MR. PACKIN: To answer that question, I certainly  
10 understand what Your Honor has just told us about your  
11 familiarity with the materials. That being said --

12 THE COURT: I'm being very up front with you, as you  
13 can see.

14 MR. PACKIN: Yes. And so I want to respond equally  
15 up front. Since Dr. Kalsher has been challenged on every  
16 aspect of the case, his qualifications, his background, his  
17 experience, his opinions, his reasoning, I'm prepared to go  
18 through all of that and at least establish on the record, for  
19 example, things about why many of his writings evidenced the  
20 methodologies that were applied in this case, and where from  
21 the materials reviewed critical facts were determined, and  
22 that is a lengthy process both --

23 THE COURT: How long do you expect you need if I  
24 give you all the time you think you need?

25 MR. PACKIN: If I were to do it in that manner,

1       probably would get close to three hours. I don't --

2               THE COURT: I can do three hours. I can do three  
3       hours.

4               MR. PACKIN: And then there are issues to address  
5       that were raised in their motion papers as well, which is also  
6       part of the purpose --

7               THE COURT: What do you mean?

8               MR. PACKIN: -- of the hearing. Well, I mean,  
9       there's some things that are claimed that will address in our  
10      presentation. So I would say it's about three hours on our  
11      end.

12              THE COURT: All right. So it's 10 o'clock now --  
13      it's 10:15. That would take us to about 1:30, right?

14              MR. PACKIN: Or thereabouts, yes, Ma'am.

15              THE COURT: Thereabouts.

16              MR. PACKIN: I mean, it could run shorter, it could  
17      run a little longer but that's an estimate.

18              THE COURT: About. Okay. I could give three hours  
19      to the other side and we'd be done by 5:30.

20              MR. PACKIN: I might need redirect, I suppose, but I  
21      don't know. I don't want to burden the Court with unnecessary  
22      testimony and time being used up. My feeling about the Motion  
23      to Disqualify is well documented in our papers. On the other  
24      hand, since it is there, I have to make my record, so --

25              THE COURT: I think we can get this accomplished

1 today.

2 MR. PACKIN: I do as well.

3 THE COURT: Mr. Walsh?

4 MR. WALSH: Your Honor, as long as the time is  
5 divided fairly, and I think Your Honor has indicated that it  
6 would be, we are flexible enough to go with whatever. I would  
7 suggest, I mean, one consideration you may want to do, since  
8 Mr. Packin raises the possibility of redirect, I'm sure as the  
9 Court's familiar, generally on a Daubert Motion the cross  
10 examining people go first, and then the presenter of the  
11 witness follows up.

12 THE COURT: That hasn't been my experience, but go  
13 ahead.

14 MR. WALSH: Okay. Well, our experiences differ.  
15 But that would be --

16 THE COURT: You've already had 14 hours.

17 MR. WALSH: I understand, but that would be one way  
18 to eliminate the need for a redirect. But I'm not suggesting  
19 we do that, I just offer it as one possible way of approaching  
20 it to save time.

21 THE COURT: What I will do is I will entertain oral  
22 argument on this hearing after today. And with that, you can  
23 rely on your 14 hours of deposition, as well as whatever comes  
24 forth today. So please don't feel, at least on the  
25 Defendant's side, that you have to get in absolutely

1 everything that you've already obtained in deposition.

2 As I said, the reason that I granted this evidentiary  
3 hearing was at the Plaintiff's request because they said that  
4 all the questioning was done during deposition, as it  
5 customarily is, by the challenger. Okay, let's go. When you  
6 need any kind of a little short break for any reason, just ask  
7 for it.

8 MR. PACKIN: Does Your Honor prefer whether I work  
9 from the lectern or my table?

10 THE COURT: Whatever's convenient for you.

11 MR. PACKIN: Okay.

12 THE COURT: Just so you know, we are using a tape  
13 recording system, digital recording system. The operator here  
14 will be replaced by his fellow staff members seamlessly so  
15 that we can just keep going. And I take notes on my laptop,  
16 and they're just notes, but they're very thorough.

17 MR. PACKIN: Thank you, Your Honor.

18 THE COURT: Okay. It doesn't mean that I'm not  
19 listening. It means I am listening intently and I will deal  
20 with objections just like that. So don't hesitate to raise  
21 objections. Okay, go ahead.

22 MR. PACKIN: I call Dr. Michael Kalsher.

23 MICHAEL KALSHER, PLAINTIFF'S WITNESS, SWORN

24 THE CLERK: Please state and spell your full name  
25 for the record.

Kalsher - Direct

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1 DR. KALSHER: Michael John Kalsher, K-A-L-S-H-E-R.

2 THE COURT: I'll let you know when I'm ready. It'll  
3 just take me a second.

4 (Pause in proceedings)

5 THE COURT: Mr. Rudolph, are you going to be doing  
6 much questioning today?

7 MR. RUDOLPH: No, Your Honor.

8 THE COURT: Would you be our timekeeper, please?

9 MR. RUDOLPH: I'm sorry?

10 THE COURT: Be our timekeeper, please.

11 MR. RUDOLPH: Sure.

12 THE COURT: Thank you. Wait a minute. We won't  
13 start until I'm ready to listen.

14 (Pause in proceedings)

15 THE COURT: You may proceed, Counsel.

16 MR. PACKIN: Thank you, Your Honor.

17 DIRECT EXAMINATION

18 BY MR. PACKIN:

19 Q. Dr. Kalsher, good morning.

20 A. Good morning, sir.

21 Q. Do you have your Curriculum Vitae available before you?

22 A. Yes, sir.

23 MR. PACKIN: Okay. And Your Honor, for the record,  
24 that is Exhibit-E attached to the certification of Stephen  
25 Rudolph in connection with this motion.

Kalsher - Direct

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1           (Plaintiff's Exhibit-E previously marked for  
2     identification)

3     BY MR. PACKIN:

4     Q.   Dr. Kalsher, on your CV it lists two offices, one at the  
5     Department of Cognitive Science at Rensselaer Polytechnic  
6     Institute, and one in Rensselaer, New York.   Could you tell us  
7     what you do at the university office?

8     A.   Yes.   At my university office I do the normal activities  
9     expected of a faculty member at a college such as Rensselaer  
10    Polytechnic Institute.   I meet with students there.   I have my  
11    teaching materials there.   I organize a lot of the research  
12    programs that I have; I file systems there.   It's where I do  
13    my business as a university professor.

14    Q.   And what do you teach at Rensselaer?

15    A.   I teach a number of topics.   As you know, my Doctorate is  
16    in industrial organizational psychology.   I also had a  
17    specialization in behavioral community psychology and some  
18    other --

19           THE COURT:   Just a second.   Could you just tell us  
20    what you're currently teaching?

21    A.   Yes, Ma'am.

22           THE COURT:   By the way, testify out to the room.  
23    I'm taking notes.   I can hear every word if you just testify  
24    right out to --

25    A.   Yes, Your Honor.

Kalsher - Direct

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1 THE COURT: -- whoever is questioning you.

2 BY MR. PACKIN:

3 Q. What are you teaching?

4 THE COURT: What are you currently teaching?

5 A. Currently I teach our experimental methods and statistics  
6 courses at the undergraduate and graduate level.

7 BY MR. PACKIN:

8 Q. Okay. And what other courses have you taught at  
9 Rensselaer? How long have you been at Rensselaer?

10 A. I've been at Rensselaer since the fall of 1988.

11 Q. And what other courses have you taught there?

12 A. I have taught general psychology as part of my other parts  
13 of writing as a professor, producing an introductory  
14 psychology textbook. I have taught human factors and design,  
15 which is our introductory course to human factors. I've  
16 taught our advanced human factors course, which typically was  
17 taken by students who are very interested in the topic of  
18 human factors after taking the introductory course or for  
19 graduate students. I've taught a course called Consumer  
20 Behavior and Design for the Lally School of Management also at  
21 --

22 THE COURT: Consumer what?

23 A. Consumer Behavior and Design, which is the application of  
24 psychological principles to management and marketing issues.  
25 And the reason they asked me to teach it was also that I could

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1 incorporate into that features of human factors and design of  
2 consumer products as an add-on to the normal course that they  
3 teach. I've taught a variety of other --

4 THE COURT: Design of what? Add-on of --

5 A. To the normal --

6 THE COURT: -- design of consumer products?

7 A. Yes, Your Honor.

8 THE COURT: I just didn't hear the words.

9 A. Yes. Ordinarily, a faculty member in the School of  
10 Management teaching that course would not also incorporate  
11 topics from human factors area that would relate to consumer  
12 products and their marketing. I taught other courses as well.  
13 For example, I started a two-series course that relates to a  
14 more forensic set of topics within psychology. For example,  
15 one course was called Psychology and the Law. The second  
16 follow-up course was called Forensic Psychology. They both  
17 dealt with primarily issues that would be on the civil side of  
18 the law. And since I created those, another faculty member  
19 has gone on to embellish those to include more criminal kinds  
20 of issues in those courses. I've taught a course called  
21 Personality and Adjustment. I've taught courses, many of them  
22 independent studies in areas of my expertise that include  
23 behavioral psychology.

24 THE COURT: That's enough.

25 A. I can't think of others. Okay.

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1 BY MR. PACKIN:

2 Q. Doctor, what is human factors? It's one area in which  
3 you've taught. Would you tell us what is the definition of  
4 the field of human factors?

5 A. Human factors, it's also referred to as ergonomics  
6 primarily in Europe, is a blended area of study that involves  
7 the investigation issues at the interface between people and  
8 products, equipment and technology. It draws on a number of  
9 areas --

10 THE COURT: Face between people?

11 A. Between people. The interface between people, their  
12 behavioral and cognitive strengths and limitations, and  
13 products, equipment, technologies, and so on.

14 THE COURT: Okay, thank you.

15 A. It typically is inhabited by professionals largely that  
16 are either psychologists or different kinds of engineers.

17 BY MR. PACKIN:

18 Q. And does the field of human factors get involved in any  
19 way with the issue of product warnings?

20 A. Yes. There are a number of human factors professionals  
21 that are involved in doing a variety of activities that are  
22 related to product and equipment warnings.

23 Q. And can you just briefly tell us how the field of human  
24 factors relates to the field of warnings?

25 A. Right. In order for warnings to be effective on products,

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1 we need to think about what measures of effectiveness are.  
2 It's generally accepted in my field that there are several  
3 measures of effectiveness to consider for warnings. One is  
4 whether or not they inform people of hazards that they need to  
5 look out for. Another is that the warnings be able to remind  
6 people at a time when they are going to come into contact with  
7 a hazard. And then of course an important criteria for  
8 effectiveness of warnings is whether or not people actually  
9 comply with a directive that could be to do behavior to avoid  
10 harm, or to cease doing a behavior in order to avoid harm.

11 Q. Is there any --

12 THE COURT: What do you mean by comply again?

13 A. To do certain behaviors that would either eliminate the  
14 possibility that you might not be -- that you would be hurt,  
15 or to take some sort of precautionary behavior, such as put on  
16 personal protective equipment or operate the equipment or work  
17 with the product in a safe way.

18 BY MR. PACKIN:

19 Q. Now, is there any national professional organization in  
20 the field of human factors?

21 A. Yes. The primary one in the United States is called Human  
22 Factors and Ergonomic Society. It has a number of different  
23 areas of interest in it that are symbolized by about 21  
24 different technical groups, or birds of a feather that are  
25 interested in different topics within the field of human

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1 factors. The two that deal most primarily with the issue of  
2 risk communication and warnings are in the Safety Technical  
3 Group, the Forensics Professional Group, and the Product  
4 Design Group.

5 THE COURT: Give me those three words again. You  
6 said there were two, and then you listed three. The two of  
7 the 21 tech groups dealing mostly with risk communication and  
8 warnings are --

9 A. I'm sorry, I misspoke, Your Honor. The primary ones are  
10 the Safety Technical Group and the Forensics Professional  
11 Group. But there are also individuals within a third called  
12 the Product Design Group that also deal with that. And I  
13 would just, not to test your patience, but as medical --

14 THE COURT: The Product Design Group?

15 A. Product Design Group, yes. There is a relatively newer  
16 technical group called Health Care that deals with issues of  
17 human factors within the medical field, and there are  
18 individuals that are in that group that also deal with risk  
19 communications and warnings as it relates to medical devices  
20 and equipment.

21 BY MR. PACKIN:

22 Q. And are you a member of the Human Factors and Ergonomics  
23 Society?

24 A. Yes. I've been a member since about 1991.

25 Q. Have you served in any capacity on the Safety Technical

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15

1 Group?

2 A. Yes.

3 Q. Tell us what you've done there in brief, please, because  
4 we do want to make sure we keep this within our three hours  
5 today.

6 A. Yes. I've served as technical program chair, which has  
7 the primary responsibility for taking in papers that are  
8 submitted for presentation at the annual meeting and then  
9 publication in the meeting proceedings. I have served --

10 THE COURT: So this is a peer review committee?

11 A. Yes, Your Honor.

12 THE COURT: For prospective papers?

13 A. For prospective papers that are submitted to the annual  
14 meeting. I have served as the chair of that technical group  
15 which works with the program chair but has other kinds of  
16 duties as well, such as attending the annual meeting to attend  
17 the Council of Technical Groups which has a meeting of all of  
18 the chairs from the various technical groups to share  
19 information and common concerns about the technical groups.

20 BY MR. PACKIN:

21 Q. Okay. Have you served in any capacity on the Forensic  
22 Professional Group?

23 A. Yes. In that technical group I have served as chair of  
24 the Forensic Professional Group.

25 Q. And very briefly, what type of subjects does the Safety

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16

1 Technical Group deal with?

2 A. It deals with the issues that are related to safety  
3 general from a human factor's perspective; that is, to take  
4 principles from psychology and engineering in order to  
5 understand how to make products safer, easier to use, things  
6 such as that.

7 Q. Okay. And how about the Forensic Professional Group?  
8 What is their general involvement? What are the topics they  
9 deal with?

10 A. The Forensic Professional Group deals with human factors  
11 issues as they relate to standards of care and accountability  
12 in legislative, regulatory and judicial areas. The idea is to  
13 take scientifically derived findings to apply to human factors  
14 issues in those areas.

15 Q. Okay.

16 THE COURT: So this would encompass legislation?

17 A. Legislative, regulatory --

18 THE COURT: Regulatory and litigation.

19 A. -- and judicial.

20 BY MR. PACKIN:

21 Q. Again, briefly, does the Human Factors and Ergonomics  
22 Society, particularly these sections that you're involved in,  
23 do they get involved in any way in developing any standards or  
24 guidelines in the field of warnings and product safety  
25 communication?

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1 A. Yes, they do, in at least two ways.

2 Q. What are those two ways, sir?

3 A. One way is through the research that individuals in those  
4 two technical groups -- and just as an aside, you don't have  
5 to be a member of those two technical groups in order to  
6 submit a paper for presentation at the meeting and publication  
7 of the proceedings. And many human factors, individuals, and  
8 sometimes people outside the Society will, in fact, do  
9 research, publish their papers, and present them at the human  
10 factors meeting. So I want to make sure that you understand  
11 that it's not a restrictive thing --

12 Q. Okay.

13 A. -- in terms of doing research and publishing papers.  
14 They're also involved in --

15 THE COURT: Just a second, please. Okay. So the  
16 question, though, was how does the Society, particularly these  
17 two sections, get involved in developing standards and  
18 guidelines. And then you said, well, people from outside the  
19 Society can seek to present papers. What's the answer to the  
20 question how to get involved in developing standards and  
21 guidelines --

22 A. Yes, Your Honor.

23 THE COURT: -- in at least two ways?

24 A. Yes. So the research findings that emerged out of human  
25 factors research are reflected in standards such as the Z535

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18

1 series of standards that are established to set up design  
2 parameters for the design and development of warnings.

3 BY MR. PACKIN:

4 Q. Okay --

5 THE COURT: And what's that term? Z what?

6 A. Z535.

7 THE COURT: Without a space in between or a hyphen?

8 A. Either, either. It's typically hyphenated.

9 THE COURT: Z --

10 A. 535.

11 THE COURT: -- 535. Series, right?

12 A. Yes.

13 THE COURT: What, standards?

14 A. Of standards. The main --

15 THE COURT: Put out by whom? Issued by?

16 A. The American National Standards Institute.

17 THE COURT: Okay. Known as ANSI?

18 A. Yes, Your Honor.

19 THE COURT: Thank you.

20 BY MR. PACKIN:

21 Q. Dr. Kalsher --

22 A. I --

23 THE COURT: I don't think you let him finish his  
24 sentence.

25 A. I didn't finish my answer.

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19

1 MR. PACKIN: I'm sorry.

2 A. The second way is that there are members of the Human  
3 Factors and Ergonomics Society that serve on those kinds of  
4 committees. For example --

5 THE COURT: I believe you. Go ahead.

6 A. I serve on the ANSI Z535 Committee, as do other members of  
7 the Human Factors and Ergonomics Society. They also serve on  
8 other kinds of standards like that.

9 BY MR. PACKIN:

10 Q. Okay. Does the Human Factors and Ergonomics Society  
11 publish any type of journal or periodical on any regular or  
12 recurring basis?

13 A. Yes.

14 Q. And have you published in the Human Factors and Ergonomics  
15 Journal?

16 A. I've published in the Proceedings of the Human Factors and  
17 Ergonomics Society. There is the Human Factors Journal, and  
18 there is another magazine that comes out of The Human Factors  
19 Society that's called Ergonomics and Design that is intended  
20 for more of a lay audience. I have not published anything in  
21 that.

22 Q. Okay. And briefly --

23 THE COURT: But you have published in the journal?

24 A. The Human Factors Journal, I don't think so, but certainly  
25 many papers in the Proceedings of the Human Factors and

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20

1 Ergonomics Society annual meeting.

2 BY MR. PACKIN:

3 Q. What's the difference between the --

4 THE COURT: Okay --

5 BY MR. PACKIN:

6 Q. -- journal and the proceedings?

7 THE COURT: -- has not published in the journal or  
8 the mag, but has published papers in presentations to the  
9 Society, right?

10 A. Let me back up. As you had indicated, as the program  
11 chair, I was tasked with bringing in papers and sending them  
12 up for peer review. So the papers that are published in the  
13 Proceedings of the Human Factors and Ergonomics Society are  
14 peer reviewed. It's one of the few journals that then allow  
15 you to publish that information outside in other journals to  
16 more widely disseminate it, and some of those publications  
17 that occurred originally in the Proceedings then are also  
18 published in the Human Factors Journal.

19 BY MR. PACKIN:

20 Q. Okay. Now, just briefly, what type of topics that would  
21 be --

22 THE COURT: I didn't get anything out of that. You  
23 have yourself presented one or more papers at one of these  
24 Human Factors and Ergonomics Society meetings, whether an  
25 annual meeting or a subgroup meeting, peer review paper by

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21

1     you, yes?

2     A.   Yes.  It's at the annual meeting, and they're organized so  
3     that sort of birds of a feather; there are a number of papers  
4     that would be presented, for example, in a symposium with an  
5     organizing title for a particular technical group.

6                 THE COURT:  That's fine.  Have you presented a paper  
7     at the annual meeting?

8     A.   Yes, many.

9                 THE COURT:  Many.  Okay, many papers.  And these are  
10    not just papers that you peer reviewed, these are papers on  
11    which you are a named author?

12    A.   Yes.

13                THE COURT:  Okay.  And then those papers are  
14    available for wider dissemination?

15    A.   Yes.

16                THE COURT:  Okay, fine.

17    BY MR. PACKIN:

18    Q.   And those proceedings become published, correct?

19    A.   Yes.

20    Q.   Okay.  Now, give us, just by topic or very brief general  
21    description, some of the topics on which you published in  
22    those proceedings that might be relevant to the field of  
23    warnings.

24                THE COURT:  Referring to his CV that I am holding?

25                MR. PACKIN:  Which you may do as well, yes.

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1           THE COURT: Okay, if you'd just turn me to a page  
2 and help me to check off a few of these that might be relevant  
3 to our case?

4 A. Yes, Your Honor. I would start on page 2. The main topic  
5 that is titled "Refereed Articles or Chapters in Books."

6           THE COURT: Yes.

7 A. I have a paper under review with colleagues that deals  
8 with evaluating symbols for the Globally Harmonized System  
9 Hazard Communication.

10           THE COURT: I see seven on that page. How far down  
11 is it?

12 A. I'm sorry, I have a more current version of my vitae. I  
13 apologize, Your Honor.

14 BY MR. PACKIN:

15 Q. Okay. Would you like me to give you the copy that I have  
16 here?

17 A. Sure, that might be better.

18           THE COURT: You can keep going though. While you're  
19 waiting for that, tell me another one on this list.

20 A. Okay. There's Williams, Kalsher and Wogalter in press.  
21 These may be too current for the copy that you have. I'll  
22 start with the one that was marked. Kalsher and Wogalter in  
23 press is, I think, the one that you have. Human Factors Basis  
24 for Labeling on Medical Devices --

25           THE COURT: Okay.

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23

1 A. -- It was a chapter that I wrote with my colleague,  
2 Michael Wogalter, for inclusion in an edited book related to  
3 topics on medical devices. And ours had to do with human  
4 factors aspects including markings and warnings. The next  
5 one, Kalsher and Wogalter in 2007, Hazard Control Methods and  
6 Warnings for Caregivers and Children. Again, it was a chapter  
7 that I wrote with my colleague, Mike Wogalter, for inclusion  
8 in an edited book related to ergonomics for children, and the  
9 focus of our chapter was on warnings and risk communication.  
10 Kalsher and Wogalter 2006, Influence of Presentation Modality  
11 on Communication of Pharmaceutical Risk Information in Direct-  
12 to-Consumer, or DTC, Television Commercials was an article  
13 that we wrote that was published in the Proceedings of the  
14 Triennial International Ergonomics Association. And that  
15 dealt with how one communicates risks regarding prescription  
16 drugs in television ads, and it was done as part of something  
17 called an incidental exposure paradigm, but it dealt with the  
18 issue of risk communication for prescription drugs. Kalsher  
19 and Williams was a book chapter entitled Behavioral Compliance  
20 and Methodology. That was published in an edited book by my  
21 colleague, Mike Wogalter, in The Handbook of Warnings. I have  
22 brought that book with me which is sitting here. It's a 64-  
23 chapter volume that addresses issues associated with warnings.  
24 This particular chapter dealt with the topic of behavioral  
25 compliance and methodologies associated with studies of

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1 warnings and risk communication.

2 BY MR. PACKIN:

3 Q. Hold on one second, Doctor. I want to focus a little bit  
4 here. I was asking you about the publications in the Human  
5 Factors and Ergonomics Society publications. You told the  
6 Court many of those have been published that you've authored  
7 or co-authored, correct?

8 A. Yes. Do you want me just to stick with the Proceedings  
9 articles?

10 Q. Well, just for the moment. The next question that I had -  
11 - because we will go back to these. Just for the moment, in  
12 the field of warnings and human factors, are the published  
13 Proceedings of the Human Factors and Ergonomics Society  
14 considered to be publications that are relied upon and used in  
15 that field of expertise?

16 A. Yes, they are. And in fact, there have been at least two  
17 issues of compilations of articles that have been published in  
18 annual meeting proceedings that cover different ranges of  
19 time.

20 Q. Okay. And have any of your articles been in those  
21 compilations?

22 A. Yes.

23 Q. Now, the other aspect -- and we're going to go back to  
24 your publications -- the other aspect that you said that the  
25 Human -- you said the Human Factors and Ergonomics Society has

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1 two functions in helping to establish standards in the  
2 warnings field. One is by what they publish. Did I state  
3 that accurately?

4 A. Yes.

5 Q. So that represents a body of literature and knowledge and  
6 research?

7 A. Yes.

8 Q. And then the other one you mentioned was contribution to  
9 the ANSI Z535 series of standards, correct?

10 A. Yes. And actually, if I may, there would actually be at  
11 least a third function, which is many individuals that would  
12 serve in that capacity would also do consulting in business  
13 and industry and also in litigation contexts such as we find  
14 ourselves today.

15 Q. Okay. Now, I believe you mentioned, if I'm wrong you can  
16 certainly correct me, that you have, in fact, participated,  
17 sat on those ANSI committees?

18 A. Yes, I currently sit on the ANSI Z535 Committee.

19 Q. All right. Explain for the Court, please, just briefly  
20 what is the ANSI Z535 series as you've described it?

21 A. Yes. The ANSI Z535 series is established in part to  
22 provide a uniform way of presenting, labeling warnings and  
23 instructions on products in particular, but to establish a  
24 uniform system for that. The Z535 standard actually is  
25 divided into sub-parts that deal with different parts of that.

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1 For example, the Z535.1 subcommittee deals with safety colors.  
2 We usually think about the color red associated with a signal  
3 word "Danger," for example. The .2 standard deals with  
4 environmental signs, meaning signs that would be used for  
5 facilities on highways, things that might be a little larger  
6 and seen at a distance. The .3 part of the standard deals  
7 with symbols that might be used as part of warnings and risk  
8 communication, and as part of that substandard, there are  
9 specific ways that one might use and present symbols and it  
10 includes a methodology as part of one of the annexes for how  
11 one does some testing of symbols.

12 Q. When you say symbols, is that what in some of the papers  
13 have been described as pictograms or pictographs?

14 A. Yes.

15 Q. Okay. And the other components of the ANSI Z535 series,  
16 sir?

17 A. .4 is the part of the standard that deals with product  
18 labeling. It was actually the first part of the standard. .5  
19 deals with temporary --

20 THE COURT: This is product labeling, .4?

21 A. Product labeling, yes, Your Honor. .5 deals with  
22 temporary tags and labels. And the newest part of the  
23 standard is the .6; that deals with ancillary kind of material  
24 such as owner's manuals, instruction manuals, and so on.

25 BY MR. PACKIN:

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1 Q. And what ANSI subcommittees have you participated in  
2 either as a member or contributor, consultant? Please tell us  
3 that.

4 A. Sure. Well, I'm a member of the main body of the ANSI  
5 Z535 Committee, but I'm also a member of the .3 subcommittee  
6 that deals with symbols, pictograms, pictographs.

7 Q. How long have you been involved in professional activities  
8 with ANSI?

9 A. My best recollection is about at least five or six years.

10 Q. And how about with the Human Factors and --

11 THE COURT: How do you get to be on ANSI?

12 A. On the ANSI Committee? In my case, I was recommended by  
13 colleagues, the two individuals that were the main  
14 representative, and then there's an alternate.

15 THE COURT: In other words, it's not like the  
16 American Bar Association where if I'm a lawyer I can just send  
17 in my dues and join a section and now I'm a member of the  
18 litigation section?

19 A. No, you must be approved for admission to the committee.

20 THE COURT: It's by recommendation?

21 A. Yes.

22 THE COURT: It's by invitation, in other words.

23 A. Usually what happens is you will be recommended. For  
24 example, not to take too long on this, but the alternate at  
25 the time, Kenneth Laughery, who's a well known person in

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1 warnings and risk communication, wanted to rotate off, and I  
2 was invited to be the alternate, and then I had to be  
3 confirmed by the larger body, the Standards Committee, as a  
4 full member, full voting member.

5 THE COURT: Okay, got it. Thank you.

6 BY MR. PACKIN:

7 Q. And do the ANSI standards, the ANSI Z535 standards, as  
8 have been published, in your field are they considered  
9 reflective of the science and thought in the field of warnings  
10 and risk communication?

11 A. In part. Some of the most important findings from  
12 warnings and risk communication research have been embodied in  
13 the recommendations that are made in the various sub-parts of  
14 the ANSI Z535 standard.

15 Q. Okay. Now, we've discussed the publications of the Human  
16 Factors and Ergonomics Society and their work. We've  
17 discussed ANSI Z535 series. Are there any other aspects in  
18 the field of warning science where we would see the thought,  
19 the research, the state of that science besides those two?

20 THE COURT: Other authoritative?

21 MR. PACKIN: Authoritative --

22 THE COURT: -- is that what you mean?

23 MR. PACKIN: -- yes.

24 THE COURT: Sources, information re: -- what did you  
25 say, warnings and science?

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1 MR. PACKIN: Warnings science, risk communication.

2 THE COURT: That's your term. Ask him if that's a  
3 term he uses.

4 BY MR. PACKIN:

5 Q. Is that a term you use, sir?

6 A. Risk communication and warnings, yes.

7 Q. Okay. Well, any other areas?

8 A. You're asking me where we would find that information?

9 Q. Yes.

10 A. It would be embodied in books such as those I brought with  
11 me. I have a 1999 edited book by Michael Wogalter, David  
12 DeJoy, and Kenneth Laughery, all well-known people within the  
13 Human Factors Committee and well known for their work in risk  
14 communications and warnings, that put together an edited book  
15 describing many topics related to warnings and risk  
16 communication and, in fact, helped to move the field forward  
17 by integrating those around a model that takes into account  
18 generally accepted theoretical frameworks from other areas.  
19 And just by way of briefly explaining what that is, that  
20 involves taking a model from the communications literature,  
21 which obviously would be related to risk communication and  
22 warnings, as well as the basic information processing model  
23 that's well established in the field of psychology. And what  
24 that organizing framework did was to provide a way of  
25 organizing the then-known findings from the science of

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1 warnings and risk communication to understand how they may  
2 relate to what the criteria for effectiveness of warnings  
3 would be. For example, I had indicated earlier whether or not  
4 they are informing people of important things they need to  
5 know about products and environments that may be dangerous, so  
6 that involves noticing a warning, and that ties into many of  
7 the generally accepted factors that contribute to noticing,  
8 comprehension, memory, and then obviously motivational kinds  
9 of issues to comply with a directive.

10 Q. Now, the other book you brought here you said is Handbook  
11 of Warnings?

12 A. Yes, Handbook of Warnings.

13 THE COURT: Could we possibly mark those? Just the  
14 cover page --

15 MR. PACKIN: Yes.

16 THE COURT: -- the title page and the table of  
17 contents so we see what the name of the book is, who published  
18 it, name of the author.

19 MR. PACKIN: Let's do the one you just discussed,  
20 Warnings and Risk Communication.

21 THE COURT: Do you have a numbering system going?

22 MR. PACKIN: I haven't, based on the discussion we  
23 had in our phone conversation, so I apologize for that, but  
24 this would be P-1.

25 (Plaintiff's Exhibit-1 marked for identification)

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1           THE COURT: P-1. Any objection, Mr. Walsh, if we  
2 just do that?

3           MR. WALSH: No objection. I would ask that we also  
4 mark the chapter that he participated in since there are 64  
5 chapters and there's one chapter that he contributed to.

6           THE COURT: Fine. And the whole book will be an  
7 exhibit, but I think we would stipulate that we will just  
8 excerpt the relevant pages for our Court exhibits, and the  
9 witness will take back his book. Is that all right?

10          MR. WALSH: Thank you.

11          MR. PACKIN: It's actually, yes, Ma'am, three  
12 chapters and not in that book, in this book.

13          THE COURT: Okay, so we've got P-1. What's the name  
14 of it?

15          MR. PACKIN: Warnings and Risk Communication.

16          THE COURT: And that is -- who's the lead author?

17          MR. PACKIN: Wogalter, W-O-G-A-L-T-E-R.

18          THE COURT: Okay, P-1 in evidence. Thank you.

19          (Plaintiff's Exhibit-1 admitted into evidence)

20 BY MR. PACKIN:

21 Q. Dr. Kalsher, have you contributed to that book directly?

22 A. I did not author any of the chapters in that book,  
23 although work that I have performed in my research is cited in  
24 that book.

25 Q. Okay. So you're cited in bibliography type material in

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1 the book?

2 A. I'm cited within the text and that appears in the  
3 references.

4 Q. Okay. Have you authored any articles in the field of  
5 warnings that are reflected in your CV with Mr. Wogalter?

6 A. Yes.

7 Q. And let's mark as P-2 one you identified before, Handbook  
8 of Warnings. And in this book I think you've indicated that  
9 you contributed to or co-authored three chapters?

10 A. Yes, sir.

11 Q. All right. What I'm going to do is I'm going to give you  
12 the book after it's marked by the Clerk as P-2 and ask you to  
13 identify the three chapters in which you were an author or co-  
14 author, and give the title as well.

15 (Plaintiff's Exhibit-2 marked for identification)

16 THE COURT: Start with the title.

17 MR. PACKIN: The title of the book is Handbook of  
18 Warnings.

19 BY MR. PACKIN:

20 Q. Would you go to the three chapters and please identify  
21 them by number and the title, and then we'll will have them  
22 marked in that order.

23 A. There it is, Chapter 23 is entitled Behavioral Compliance:  
24 Theory, Methodology and Results.

25 MR. PACKIN: We'll mark that Chapter 23 as P-3.

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1 THE COURT: Behavioral Compliance: Theory --

2 A. Methodology and Results. The second chapter that I  
3 contributed to as a co-author is Chapter 49, entitled  
4 Allocation of Responsibility For Injuries.

5 THE COURT: So you actually co-authored these  
6 chapters? You weren't just editing other people's work?

7 A. Correct. On the first chapter that I noted, I was the  
8 first author. On the chapter that I just cited, Chapter 49, I  
9 was a co-author. And the third one is Chapter 50, entitled  
10 Jury Decision Making in Civil Litigation: Compensatory and  
11 Punitive Awards. I'm sorry to add things in, but I thought  
12 part of the question was how I had contributed or how human  
13 factors individuals had contributed other than the methods  
14 that you told me, and that's one of the reasons why I cited  
15 these two books.

16 MR. PACKIN: Okay.

17 THE COURT: P-2 in evidence. The contents that will  
18 be excerpted should be stipulated between the parties.

19 (Plaintiff's Exhibit-2 admitted into evidence)

20 MR. PACKIN: Okay, we can do that right now.

21 BY MR. PACKIN:

22 Q. So if I understand correctly, we have the publication such  
23 as Human Factors and Ergonomics Society produced, ANSI  
24 standards and textbooks such as the two we've marked here,  
25 correct?

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1 A. Yes.

2 Q. Do those represent the authoritative publications and  
3 state of the art, so to speak, in the field of warnings and  
4 risk communication?

5 THE COURT: Talking about the United States.

6 BY MR. PACKIN:

7 Q. In the United States.

8 A. I would say that these two textbooks are relied on  
9 heavily, and they're very informative for the purposes of  
10 explaining many of the issues involved in developing risk  
11 communications and warnings.

12 Q. Together with the other --

13 THE COURT: The question was the three sources.

14 MR. PACKIN: Correct.

15 THE COURT: These handbooks here, textbooks,  
16 whatever they are, plus the ANSI process, including its  
17 committees and its standards, plus the Society and its  
18 proceedings and its peer reviewed publications.

19 A. Yes, and --

20 THE COURT: Those are the three sources that the  
21 question included.

22 MR. PACKIN: Yes.

23 A. Those were three. And I don't want to leave it -- for  
24 reasons of completion, The Human Factors and Ergonomics  
25 Society and its publications are not the only journals, peer

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1 reviewed journals, that publish this kind of information. It  
2 appears in other human factors related or perhaps psychology  
3 related journals.

4 BY MR. PACKIN:

5 Q. All right. So, but the three areas we've identified,  
6 would you consider those significant parts of the  
7 authoritative information in the field of warnings and risk  
8 communication?

9 A. Yes, they would be three significant parts.

10 Q. And could you tell us one or two additional publications  
11 that are used and relied upon regularly in the field of  
12 warnings and risk communication, one or two?

13 A. Sure. There's one from 2006 which was written by Kenneth  
14 Laughery that lays out --

15 THE COURT: Spell it.

16 A. L-A-U-G-H-E-R-Y. It's actually Senior because he has a  
17 son that does work in this area as well. It was an article  
18 written in 2006 that lays out a lot of the issues associated  
19 with risk communications and warnings in a way that not just  
20 professional researchers in this area, but a variety of people  
21 could benefit from.

22 BY MR. PACKIN:

23 Q. I don't want specific articles. Give the Court the name  
24 of one or two journals. We have the Human Journal that the --  
25 or Proceedings that are published by the Human Factors and

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1 Ergonomics Society. One or two others in your field of  
2 warnings and risk communication that are regularly read, used,  
3 relied upon by experts in your field, if there are other  
4 journals.

5 THE COURT: Well, he mentioned psychology journals.

6 MR. PACKIN: Right.

7 THE COURT: You know, we find it sprinkled through  
8 those, and there are many of those.

9 A. Yes.

10 MR. PACKIN: Okay.

11 BY MR. PACKIN:

12 Q. Have you contributed to any of those literature?

13 A. Sure. We could go through my CV if you would like.

14 Q. I just asked if you've contributed to them at the moment.

15 A. Yes.

16 Q. Okay. And any others? Any other journals?

17 A. There are many journals that the work shows up in --

18 Q. Okay.

19 A. -- but I don't know that I can detail all of them.

20 Q. All right. Now, you have three degrees: Bachelor of  
21 Science and Psychology according to your CV, correct?

22 A. Yes.

23 Q. Master's of Science and Applied/Experimental Psychology?

24 A. Yes.

25 Q. And in the briefest of terms, tell us if that area of

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1 study relates at all to warnings or risk communications, and  
2 if so, how? But in the briefest of terms.

3 THE COURT: You're talking about all three of his  
4 degrees?

5 MR. PACKIN: No, the Applied and Experimental  
6 Psychology, the Master's.

7 A. My Master's Degree?

8 BY MR. PACKIN:

9 Q. Yes.

10 A. It very much would because it dealt with topics of  
11 perception, motivation, learning and behavioral principles;  
12 many of the things that underscore elements that are likely to  
13 make a warning effective or ineffective.

14 Q. You have a Ph.D. in Industrial/Organizational Psychology.  
15 Did that degree, did that study involve any areas that are  
16 pertinent to warnings and risk communication?

17 A. Yes. Industrial/Organizational Psychology generally has  
18 to do with the application of psychological principles  
19 regarding behavior and cognition as it relates to people in  
20 the workplace. The majority of the research that I did in my  
21 Ph.D. program, which is common to most Ph.D. programs like  
22 that that have an experimental focus, was in behavioral and  
23 community psychology, which deals with important principles  
24 that would be directly related to risk communication and  
25 warnings.

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1           THE COURT: What's it called? Main research  
2 projects were in behavioral and --

3 A. Behavioral and community psychology. For example, some of  
4 the projects that I've worked on had to do with developing  
5 strategies, techniques, interventions for getting people to  
6 increase their safety belt usage. There are several  
7 publications in my CV that reflect my participation in those  
8 studies.

9           THE COURT: Okay, thank you. I get it.

10 A. Okay.

11 BY MR. PACKIN:

12 Q. Now, your CV also mentions a home office. What type of  
13 professional activities, if any, do you do out of your home  
14 office?

15 A. I have set that up primarily to set apart my consulting  
16 activities from the activities of my work as a professor at  
17 Rensselaer Polytechnic Institute. So anything that I do on a  
18 consulting basis I would do out of my home office.

19 Q. In what field have you done consultative or consulting  
20 work?

21           THE COURT: Can I just ask you what percentage of  
22 your time in the past year, of your work time, work time, do  
23 you allocate to the home office and the academic scene?

24 A. Right. As a matter of what I'm supposed to do for RPI,  
25 we're generally given about one day a week that we can do

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1 activities like this in the course --

2 THE COURT: Are you full time on staff at the  
3 university?

4 A. I'm a full-time tenured faculty member at RPI, yes.

5 THE COURT: Okay. And so you're still working full  
6 time?

7 A. Yes.

8 THE COURT: Academically.

9 BY MR. PACKIN:

10 Q. And briefly, what type of consultative work do you do?

11 A. In the last few years the vast majority had been related  
12 to consulting in the litigation field, but in the past I've  
13 done other things as well.

14 Q. Briefly, such as?

15 A. For example, I did work as a psychometrician for a  
16 business in Albany, New York, that worked to get the contracts  
17 with the State of New York for different kinds of exams; for  
18 example, a certification examination for optometrists.

19 Q. Okay. Does this have anything to do with warnings, that  
20 work?

21 A. That work only tangentially in that it dealt with research  
22 methodology and statistics, but it's indirectly related.

23 Q. Okay. And besides litigation consultation, what other  
24 consultation work have you done?

25 A. I've done consultation work for Carolina Health Care

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1 Systems. It's a medical facility, and they were interested in  
2 human factors perspectives on some of the safety systems  
3 there. I did a similar consulting job at Hershey Medical  
4 Center that also had a warnings component to it. They were  
5 interested in having somebody consult on a project for a  
6 warning for their NICU unit that I helped with. I've also  
7 done consulting for Dominos Pizza in the late 1980s through  
8 early 1990s, where we were helping them to develop training  
9 programs for their drivers who deliver pizzas. And in fact, I  
10 wrote a training program, training manual for them for their  
11 drivers and participated in making a film that was supposed to  
12 be an adjunct for that.

13 Q. Okay. And in your consultative work in litigation, has it  
14 been limited to just Plaintiffs, just Defendants in any way?

15 A. I don't make any limitations at all. I don't advertise  
16 that I'm an expert witness. People just call me. As it turns  
17 out, the vast majority of the cases that I've been asked to  
18 consult on have been by plaintiffs' attorneys. I've consulted  
19 with at least two defense attorneys on cases, but I don't hold  
20 myself out as a plaintiff's expert.

21 Q. Now, you've also submitted in this matter a list of cases  
22 in which you testified or participated in testimony either by  
23 way of deposition or trial testimony, is that correct?

24 A. Yes.

25 Q. And the one that was submitted in this case had 18 matters

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1 in which there was testimony given, is that correct?

2 A. I believe that's correct.

3 Q. Were those all in the capacity of an expert witness?

4 A. Yes.

5 Q. Were those all in the field of warnings and/or risk  
6 communication?

7 A. I think most, if not all, have been on risk communications  
8 and warnings.

9 Q. In any of those matters has --

10 THE COURT: This is deposition and/or trial?

11 A. Yes.

12 THE COURT: And all had to do with warnings?

13 A. Primarily with issues of risk communication and warnings.

14 BY MR. PACKIN:

15 Q. In any of those matters, has any Court not accepted your  
16 qualifications as an expert witness in the field of warnings  
17 or risk communication?

18 A. No.

19 Q. On your CV, if we go back to the publications, you list,  
20 by my count, 35 refereed articles or chapters in books.

21 You've given us some of them, the ones on page 2, some of them  
22 in there. There's one, International Journal of Industrial  
23 Ergonomics on page 2, evaluating latex glove container  
24 warnings in a realistic setting. By the way, these are all  
25 peer reviewed? When you say refereed, does that mean peer

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1 reviewed?

2 A. Yes, sir.

3 Q. All right. And that was a peer reviewed article in the  
4 field of warnings, correct?

5 A. Yes.

6 Q. And just in the briefest of terms, what aspect of warnings  
7 were looked at there?

8 A. Yes. What we were doing is comparing the actual labeling  
9 found on containers of latex gloves that were being sold at  
10 that point in time as compared to two alternatives for that.

11 Q. Okay. And recognizing that I'm skipping through these,  
12 the Court has indicated to us that the CV is available and has  
13 been read, but I just want to talk about a few of them  
14 randomly. If you look on page 3 --

15 THE COURT: Counsel, I think we need to mark an  
16 exhibit because you seem to have a more up-to-date version  
17 than the one that was in the motion papers. Can we mark it P-  
18 3?

19 MR. PACKIN: Yes. It should be the same. Can I  
20 have the one here from the motion papers?

21 THE CLERK: Sir, if you're going to speak between  
22 that microphone and that microphone you need to wear this  
23 (indiscern.) mic.

24 MR. PACKIN: Okay.

25 THE COURT: Ms. Heffner, hand counsel the copy that

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1 I have extracted from the motion papers. He can compare it  
2 with what he's using.

3 MR. PACKIN: It looks identical.

4 THE COURT: Have him identify it as his current  
5 version then and we can mark it.

6 BY MR. PACKIN:

7 Q. Is the CV that I've handed you an accurate CV at the time  
8 it was submitted in this litigation when you submitted your  
9 expert report?

10 A. Yes.

11 THE COURT: Is it current now?

12 A. No.

13 THE COURT: That's the question.

14 BY MR. PACKIN:

15 Q. Okay. Have there been additional articles and  
16 publications?

17 A. Yes, I started to tell the Judge a couple of them. That's  
18 when we decided that my most current one wasn't exactly -- but  
19 it would differ only in terms -- I do it in terms of the most  
20 current things are higher up on the list, so those would be  
21 the differences.

22 MR. PACKIN: So the one he's working from, Your  
23 Honor, is identical to the one that you have from the motion.

24 A. Yes, I put the newer one aside.

25 THE COURT: Okay. Could we just mark your copy,

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1 Counsel, P-3 so we know for sure which one we were looking at  
2 today? Any objection, Mr. Walsh?

3 (Plaintiff's Exhibit-3 marked for identification)

4 MR. WALSH: No, Your Honor, but I would like to  
5 receive a copy of it.

6 THE COURT: This is the one that's in the motion  
7 papers, no change.

8 MR. WALSH: It's already in the motion papers?  
9 Okay.

10 MR. PACKIN: I took it right out of your motion.

11 THE COURT: Do you have a copy of that?

12 MR. WALSH: I would have, if it's attached to our  
13 motion papers, I would have it. I just haven't seen it. I  
14 didn't know what we were talking about.

15 THE COURT: Do you need a copy?

16 MR. WALSH: No, no, I'll find it.

17 THE COURT: Let us know and we'll give you one.

18 MR. WALSH: May I ask Mr. Packin a question?

19 THE COURT: Off the record.

20 (Off the record)

21 THE COURT: Back on the record. P-3 in evidence is  
22 Dr. Kalsher's curriculum vitae as current at the time that it  
23 was attached to the motion papers in this case. If he has  
24 additions to that, they're not included in P-3. P-3 in  
25 evidence. Okay.

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1 (Plaintiff's Exhibit-3 admitted into evidence)

2 MR. PACKIN: Thank you, Your Honor.

3 THE COURT: You can continue, Counsel.

4 BY MR. PACKIN:

5 Q. On page 3, for example, there's a refereed article, Hazard  
6 Level Perceptions of Warning Components and Configurations in  
7 The International Journal of Cognitive Ergonomics. Just  
8 generally and briefly, what did that article deal with?

9 A. Can you point me to where you're looking?

10 Q. Page 3.

11 A. Yes.

12 Q. The fifth article down.

13 A. Oh, Hazard Level Perceptions, yes. What we were doing is  
14 working with the person who actually does produce warnings to  
15 go on products and machines to look at alternative  
16 configurations of components and figures that might be used to  
17 enhance the effectiveness of different kinds of warnings, such  
18 as color or alternative signal words.

19 THE COURT: Which article is that?

20 MR. PACKIN: It's the fifth one down on page 3.

21 THE COURT: Thank you. That's enough.

22 BY MR. PACKIN:

23 Q. On the bottom of page 3, the last article, Behavioral  
24 Compliance With Warnings: Effects of Voice Context and  
25 Location in the publication Safety Science. You were a co-

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1 author in that one, correct?

2 A. Yes, sir.

3 Q. And would you briefly describe what that article dealt  
4 with?

5 A. Yes. That is one of several that I investigated with my  
6 colleague, Mike Wogalter, in this case, Bernadette Racicot, to  
7 use a setup to look at the factors that might contribute to  
8 behavioral effectiveness, meaning compliance to a warning.  
9 And it was set up in a guise in which there is a realistic  
10 looking chemistry mixing experiment. And the reason that we  
11 have to do these is that you cannot expose people in these  
12 studies to real harm, but you need to set up a guise that  
13 would make it believable, or as realistic as possible. In  
14 this particular study, we were looking at the effects of  
15 spoken warning, the context in which it was found, and the  
16 location of the warning, whether, for example, it would be on  
17 a poster nearby where they were going to do the mixing  
18 experiment or located in a set of instructions.

19 Q. Okay. And you also listed on your CV, beginning on page  
20 4, by my count, 51 refereed Proceedings articles. By  
21 refereed, again, does that mean peer reviewed?

22 A. Yes.

23 Q. And those are articles that were published as a result of  
24 proceedings where you made presentations or contributions?

25 A. Yes. Almost universally, if you submit a paper and it's

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1 accepted for publication in the Proceedings, it's typically  
2 presented in the context of either a symposium with group  
3 papers around the theme, or sometimes now they're presented as  
4 posters because some authors feel like you get more  
5 interaction by a more informal setting to talk to people about  
6 your work.

7 Q. All right. For example, if we go to page 5, the sixth  
8 article down, Applications of Warnings Research: Consumer  
9 Industry and Forensic issues. Just in the briefest of terms,  
10 please, how did that relate to the field of warnings and risk  
11 communication?

12 A. It was to discuss more general issues in the context of a  
13 more relaxed presentation in which each of the contributors to  
14 the paper would discuss issues of how warnings are applied in  
15 different kinds of situations and some of the issues involved  
16 with those warnings.

17 Q. Okay. And the fourth from the bottom on page 5,  
18 Evaluating Choking Child Pictorial Symbols in the Proceedings  
19 of the International Ergonomics Association and the Human  
20 Factors and Ergonomics Society Congress. Just in the briefest  
21 of terms, how did that relate to warnings and risk  
22 communication?

23 A. Yes, in this case, pictorials are often used to augment  
24 warnings or sometimes serve on their own. In this case, we  
25 were looking at pictorials directly directed towards conveying

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1 or connoting a choking hazard. One of the co-authors on that,  
2 Jennifer Wolf, has a talent, an artistic talent, and she  
3 devised many alternative pictographs to depict that. And we  
4 went through a process of trying to identify which one  
5 individually might best depict a choking hazard. And then  
6 later, in this and related research then, what we did was pick  
7 a tact to find out how people would select these if in case  
8 you were trying to depict a choking hazard in which case  
9 normal events in human life have a beginning, a middle, and an  
10 end. And it was interesting that we found that sometimes the  
11 pictographs chosen for different parts of the story weren't  
12 necessarily those that received the highest ratings when they  
13 were rated individually.

14 Q. And does your CV as it was submitted in connection with  
15 the motion in this case, which at that time consisted of 25  
16 pages, accurately reflect the publications and presentations  
17 that you had been involved with in the field of warnings and  
18 risk communication as of that time?

19 A. Yes, sir.

20 Q. Okay. On the last page of that CV, it indicates five  
21 different professional societies in which you had been a  
22 member or are currently a member, is that accurate?

23 A. Yes, sir.

24 Q. Okay, and --

25 THE COURT: You mentioned something about evaluating

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1 civil juries. Is that on your CV?

2 A. I participated in research in which we look at how  
3 different configurations of warnings and how different  
4 entities in the chain that lead from the manufacturer,  
5 sometimes through a distributor, an employer to an end user,  
6 might affect how participants viewed as mock jurors might  
7 attribute blame to the various entities that are involved in  
8 either the development or the distribution of the warning as a  
9 function of different kinds of factors, such as the quality or  
10 presence of a warning.

11 THE COURT: Is that a published article? Is that in  
12 your CV somewhere?

13 A. Yes, somewhere in there.

14 THE COURT: Somewhere in there. Okay. You'll let  
15 us know. Keep going, Counsel.

16 MR. PACKIN: Thank you.

17 BY MR. PACKIN:

18 Q. And you received a number of grants that are listed on  
19 your CV in your field, correct?

20 A. Yes.

21 Q. Do those accurately reflect the grant work and grant  
22 research that you had been commissioned to do as of the time  
23 the CV was submitted?

24 A. What page are you on, sir?

25 Q. Starting on page 11, 15 grants.

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1 A. Yes, that would reflect that.

2 Q. Your CV indicates you have made approximately 115  
3 conference presentations in the field of warning or safety or  
4 risk communication in your career as of that date. Is that  
5 accurate, sir?

6 A. Most, if not all, would be related to either the general  
7 area of safety or risk communications and warning.

8 Q. And you've run, according to your CV, approximately 35  
9 workshops in your field, is that correct?

10 A. Yes.

11 Q. And do those titles as contained on that exhibit  
12 accurately reflect the subject matter?

13 A. Let me get to that page. Yes.

14 Q. All right. On your CV, it indicates you co-authored a  
15 study entitled The Influence of Location and Pictorials on  
16 Behavioral Compliance to Warnings. Is that accurate, sir?

17 A. Where are you again, please?

18 Q. In one of your studies, sir.

19 THE COURT: What page, Counsel?

20 MR. PACKIN: I'm going to have to find that. Page  
21 7.

22 A. And can you repeat what you were asking me?

23 BY MR. PACKIN:

24 Q. Yes. Let me go to that page. It's the one, two, three,  
25 it's the fifth from the bottom, The Influence of Location and

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1 Pictorials on Behavioral Compliance to Warnings, published  
2 with Mr. Wogalter, who you mentioned before, and somebody  
3 named Racicot.

4 A. Yeah.

5 Q. Proceedings of the Human Factors Society. Just generally,  
6 what did that involve?

7 A. Yes, again, that was part of the series that I described  
8 earlier in which we're using the fictitious but hopefully  
9 realistic appearing chemistry mixing task in order to identify  
10 factors that might contribute to, again, effectiveness  
11 measures of warnings as measured by things like seeing the  
12 warning, recalling the warning, and complying with the  
13 warning.

14 Q. In your career, have you participated in testing  
15 pictorials or pictograms in conjunction with the ANSI testing  
16 protocols that you alluded to earlier?

17 A. Yes, I published one paper with Shelley Deppa in which we  
18 evaluated a set of pictorials. It was kind of a pickup on an  
19 earlier project that she had done with another colleague, Curt  
20 Braun, in which we wanted to --

21 Q. All right, I just want --

22 A. Yes.

23 Q. -- a more general reference.

24 A. Yes, we did that.

25 THE COURT: Is it on here?

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1 MR. PACKIN: Yes. It is in the deposition taken in  
2 Stout matter on December 16th, 2008. It's not specifically  
3 addressed on the CV because it has to do with tests he was  
4 asked about testing.

5 THE COURT: Oh, okay, it's on testing.

6 MR. PACKIN: Right.

7 BY MR. PACKIN:

8 Q. In your CV, there's a mention -- strike that, strike that.  
9 Dr. Kalsher, do you own any hand-held power tools?

10 A. Yes.

11 Q. What do you own?

12 THE COURT: Okay, Counsel, before we get there, I  
13 think we could use a five-minute break.

14 MR. PACKIN: Okay.

15 A. Thank you, Your Honor.

16 THE COURT: Once I declare a break, everybody --

17 (Court in recess)

18 THE COURT: Back in session.

19 MR. PACKIN: Thank you, Your Honor.

20 DIRECT EXAMINATION (CONT'D)

21 BY MR. PACKIN:

22 Q. Dr. Kalsher, in reaching the opinions that you arrived at  
23 in this case as embodied in your report, which we will mark in  
24 a moment, and your deposition testimony, did you draw upon  
25 your education --

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1 A. Yes, sir.

2 Q. -- readings, publications, background, and experience in  
3 the field of warnings and risk communication as contained in  
4 your CV and as described here in your testimony today?

5 A. Yes, sir.

6 Q. In reaching your opinions in this case, did you measure  
7 the warnings and the risk communication system, the warning  
8 system that Stihl used with this product, against generally  
9 accepted standards in the field of warnings and warning  
10 science or your own personal standards?

11 A. Against established standards, yes.

12 Q. Now, where we left off, do you own any power tools?

13 A. Yes.

14 Q. What type of power tools do you own?

15 A. I own two lawn mowers, I own --

16 THE COURT: Two power lawn mowers?

17 A. Two power lawn mowers. I own a Stihl brush cutter or  
18 hedge trimmer, I own a string grass trimmer, I own a circular  
19 saw, I own a reciprocating saw. I now own a Stihl cut-off  
20 machine that I purchased off the internet for use in assisting  
21 me with this case.

22 THE COURT: So you have a reciprocating saw and a  
23 circular saw?

24 A. Yes.

25 THE COURT: And then you have your non-functional,

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1 second-hand --

2 A. Yes, and I also --

3 THE COURT: -- model of this.

4 A. I own a chainsaw.

5 THE COURT: Okay.

6 A. A sander.

7 THE COURT: And you got this used, non-functional  
8 model of the machine in question?

9 A. Yes.

10 BY MR. PACKIN:

11 Q. The power tools other than the cut-off saw that you  
12 mentioned, do you use those on a regular basis in your  
13 everyday life?

14 A. Yes.

15 Q. And I believe according to the papers, at one time you  
16 rented a Stihl cut-off saw, correct?

17 A. Yes. Also, I own a snow thrower. I don't know if we're  
18 done with that or not.

19 Q. Okay, go ahead. Sorry.

20 A. Probably a few other things that I may not be thinking  
21 about, but yes, I rented a Stihl cut-off saw from my local  
22 dealer.

23 THE COURT: And when we say Stihl, we're talking  
24 about the brand name?

25 MR. PACKIN: Yes, Ma'am, S-T-I-H-L. Okay.

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1 THE COURT: When you use the word Stihl in any other  
2 way, please let us know.

3 A. Yes.

4 THE COURT: S-T-I-H-L is what we will instruct the  
5 transcriber to say unless you tell us otherwise.

6 MR. PACKIN: Your Honor, I'm going to offer for  
7 marking as, I think we're up to P-4 --

8 THE COURT: Yes.

9 MR. PACKIN: -- a copy taken directly from the  
10 Defendant's moving papers of Dr. Kalsher's report dated  
11 November 6, 2009, which is Exhibit-A in the certification of  
12 Stephen Rudolph in support of the Defendant's motion.

13 THE COURT: P-4 is his expert report dated --

14 MR. PACKIN: November 6.

15 THE COURT: -- November 6, 2009. Any objection if  
16 we mark that in evidence for this hearing.

17 MR. WALSH: None, Your Honor.

18 (Plaintiff's Exhibit-4 marked for identification)

19 (Plaintiff's Exhibit-4 admitted into evidence)

20 THE COURT: Counsel, just let me assure you that  
21 anything marked in evidence at this hearing is a hearing  
22 exhibit only. I'm making no rulings about their evidentiary  
23 admissibility in any trial.

24 MR. PACKIN: Understood. Thank you.

25 BY MR. PACKIN:

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1 Q. Do you have a copy of that in front of you, Dr. Kalsher?

2 A. Yes.

3 Q. In that report, on the first page you, in 12 numbered  
4 paragraphs, set forth some materials that were available to  
5 you before you wrote your report, is that accurate?

6 A. Yes.

7 Q. Briefly, what did the Falls Township police report  
8 provide? What type of information did that provide you  
9 specific to this case?

10 THE COURT: If you recall.

11 BY MR. PACKIN:

12 Q. Yes, if you recall.

13 A. Sure. It provided me with factual information about the  
14 date that it occurred, the day that it occurred, generally who  
15 was there. There were many pictures that I was able to look  
16 at associated with that, including a picture of the Stihl saw  
17 without the yellow sticker on it. There were a variety of  
18 things that allowed me to see more contextual information  
19 about where the accident took place.

20 Q. Okay. Do you also have the JJS -- and by JJS, you're  
21 referring to Joseph Jingoli and Sons, Mr. McGee's employer?

22 A. Yes.

23 Q. You had the JJS incident/accident reports. What type of  
24 information did that provide you with with respect to this  
25 accident?

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1 A. Again, provided me with more background information,  
2 again, about who was at the scene, contextual information, a  
3 description of the accident, things of that nature.

4 Q. Okay. It indicates in item 2 you had a TS 400 owner's  
5 manual. By TS 400, we're referring to the cut-off saw model  
6 that was involved in this accident, correct?

7 A. Yes.

8 Q. Okay. And did you read that owner's manual?

9 THE COURT: Just a second. Let's just get that for  
10 the record. Model? It's a what?

11 MR. PACKIN: TS 400 is the model of cut-off saw that  
12 was involved in this accident.

13 THE COURT: So, it's a Stihl cut-off saw?

14 MR. PACKIN: Yes, ma'am.

15 THE COURT: Model?

16 MR. PACKIN: TS, capital T, capital S, 400.

17 THE COURT: You agree? Sir, do you agree?

18 A. Yes, yes, Your Honor.

19 THE COURT: Okay, fine. Go ahead.

20 BY MR. PACKIN:

21 Q. And did you read that owner's manual in total?

22 A. Yes, I did.

23 Q. What type of information did the owner's manual provide  
24 you with?

25 A. It gave me actually a lot of background information. It

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1 gave me information about what the product is, what it's  
2 designed to do. It gave me a lot of background information on  
3 what the nature of the hazards are associated with this. It  
4 gave me an idea of what the manufacturer thought were hazards,  
5 which, in effect, served the purpose of the hazard analysis to  
6 identify those for me. It gave me an idea of the kinds of  
7 warnings that they had in those pages about the device.

8 THE COURT: And an idea -- of course you can see the  
9 warnings that they had? It set forth the warnings --

10 A. Yes, Your Honor.

11 THE COURT: -- contained in the manual.

12 BY MR. PACKIN:

13 Q. Did the manual provide you with any information as to what  
14 types of environments the saw was intended to be used in?

15 A. Yes. It gave me an idea that it would be used outside.  
16 Given that my understanding of the saw is that it essentially  
17 grinds or cuts things, there are two primary kinds of blades  
18 that are used on it, a composite blade that's used to grind  
19 cement, stone, several different kinds of metal, a diamond  
20 blade that is used to cut through concrete, things like that.  
21 It also gave me an idea that --

22 THE COURT: Two basic kinds of blades would be the -  
23 - what did you call it?

24 A. That are intended --

25 THE COURT: That you made --

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1 A. They're intended for use on the saw that you can cut  
2 various kinds of material.

3 THE COURT: Okay. And those are? You just  
4 mentioned them. It's a --

5 MR. PACKIN: If I can help, composite and diamond.

6 THE COURT: Corrosive? What is it?

7 MR. PACKIN: Composite and diamond is what he said.

8 THE COURT: Composite grinding?

9 A. A composite grinding blade and a diamond cutting blade.

10 THE COURT: Go ahead.

11 BY MR. PACKIN:

12 Q. Did the manual provide you with any information as to the  
13 types of people, or types of users?

14 A. Oh, I'm sorry, I didn't completely --

15 Q. Okay.

16 A. -- complete my answer. If I may?

17 Q. Yes.

18 THE COURT: Right.

19 A. Along the lines that you asked me the question about the  
20 environments, and it gave me information about the fact that  
21 it would be used outside, it would be used to grind things  
22 that perhaps would become dirty. There is a feature on the  
23 saw that allows for the connection of a water hose in case  
24 there's a lot of dust that would help you bring the dust down,  
25 and that would create a condition that was relevant to, you

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1 know, my research in this case that would suggest that when  
2 they get dirty, you have to be concerned about things like  
3 getting the machine dirty, covering up the labels, being able  
4 to clean those machines. And so it gets into issues again  
5 relevant to my opinion, such as the durability of the labels  
6 and so on.

7 Q. Okay. Did the manual provide you with any information as  
8 to the type of individuals who would be expected to be users  
9 of this product?

10 A. Yes, it gave me a general idea that it would be primarily  
11 people that work in construction trades, although it's my  
12 understanding that other people such as me could buy it, but I  
13 think it gave me the idea that primarily it would be people in  
14 construction that would be grinding or cutting metal, that  
15 would be grinding cement and other kinds of stone.

16 THE COURT: Primarily by persons in the construction  
17 setting, right?

18 A. Yes.

19 THE COURT: But you said something about other  
20 people?

21 A. Yeah, there's no prohibition against the distributor  
22 selling it to lay people such as myself.

23 THE COURT: The question is what does the label say?  
24 The manual, rather.

25 A. The manual is generally intended for use in construction.

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1 BY MR. PACKIN:

2 Q. And would there be any significance to you as evaluating  
3 the warning system as to a tool primarily intended to be used  
4 in construction trades versus, for example, tools used by  
5 consumers?

6 THE COURT: I'm sorry, Counsel, since we don't have  
7 a Court Reporter, if I don't get the question, I need to ask  
8 it to be repeated. It's not that easy to just play it back.

9 MR. PACKIN: Not a problem.

10 THE COURT: Okay. Ask the question again, please.

11 BY MR. PACKIN:

12 Q. From your perspective as an expert in the field of  
13 warnings and risk communication, is it of any significance  
14 that this is a tool intended to be used by construction  
15 workers as distinguished from a consumer product, one which a  
16 homeowner might purchase and use at home?

17 A. Yes.

18 Q. In what way would that be of significance to you in  
19 evaluating a warning system?

20 A. Well, one way is that you could reasonably assume that the  
21 people that would be using it wouldn't necessarily be the  
22 people who purchased it, nor would they be the people that  
23 would repair it. And so it's reasonable to assume that not  
24 every user would get a copy of the manual.

25 Q. Item 4 lists deposition transcripts, a number of

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1 deposition transcripts. Did you read each one of those  
2 deposition transcripts?

3 A. Yes.

4 Q. And who were the -- in descriptive terms, who were the  
5 individuals whose deposition testimony was available to you  
6 and you read before reaching your opinions in this case?

7 A. Well, first I read all of the deposition transcripts that  
8 were given to me.

9 Q. Yes.

10 A. And they gave me a lot of important information that was  
11 relevant to my opinion.

12 Q. But just before we get to that, who were these people?  
13 They fall into different categories, do they not?

14 A. Yes.

15 Q. Who were these different people? What categories did they  
16 fall into?

17 THE COURT: As you look over this list now.

18 MR. PACKIN: Right.

19 THE COURT: As you recall.

20 A. Okay. As I look over the list, you have different  
21 categories. For example, there were the regular users. Is  
22 that what you're asking me?

23 BY MR. PACKIN:

24 Q. Yes, yeah.

25 A. For example, Mr. Rivera was a user of those, Mr. McGee was

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1 a user of the machine.

2 THE COURT: Talking about the --

3 A. The Stihl TS 40 cut-off saw.

4 THE COURT: Are you talking about the Mr. McGee who  
5 was injured?

6 A. Yes, yes. He was a user of it. Steve Caldwell was a  
7 user. Then we have, as another example of types of people  
8 involved with this, you have Stefan Hoffmaster and George  
9 Brown, who are involved in doing maintenance. One example of  
10 how Mr. Hoffmaster served a bit different function was he was  
11 the one that ordered in new labels, the yellow sticker that's  
12 intended to go on the side of the Stihl cut-off machine. He  
13 would do that. As I look through this, let's see who else I  
14 have here. Mr. Kilker was in a different category in that he  
15 worked for Sanders Equipment, the company that sold the cut-  
16 off saw to the Jingoli Construction Company that ended up  
17 putting that to work at their construction sites.

18 THE COURT: What do you mean sold it?

19 A. The cut-off saw that is in question, along with others,  
20 were purchased from Sanders Equipment.

21 THE COURT: So Kilker is a Sanders rep?

22 A. Sanders rep, Sanders employee.

23 THE COURT: Sanders employee, which is the seller.

24 A. Is the seller, yeah, the distributor.

25 THE COURT: Distributor. Yes, go ahead.

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1 A. Mr. Spiritosanto, I believe, was one of the police  
2 investigating the accident. Ron Brown --

3 THE COURT: S-P-I-R-I-T-O-S-A-N-T-O is an officer,  
4 right?

5 A. Yes, Your Honor.

6 THE COURT: Police investigating officer.

7 A. Ron Brown, I believe, was a supervisor at the time.

8 THE COURT: Not the same as --

9 A. George Brown is different.

10 THE COURT: Oh, okay.

11 A. George Brown --

12 THE COURT: George Brown is maintenance.

13 A. Correct.

14 THE COURT: Right?

15 A. Correct.

16 THE COURT: Ron Brown is a supervisor?

17 A. A supervisor. Joseph Rafolo (phonetic) I believe was a  
18 person who did ANSI kinds of training for Jingoli Sons.

19 THE COURT: Rafolo does training?

20 A. Does training, ANSI related training. And who am I  
21 missing?

22 THE COURT: And is he an employee?

23 A. I think he works on a consulting basis, although I can't  
24 be certain on that.

25 THE COURT: At Jingoli though, right?

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1 A. At Jingoli, yes. And Mr. Linsbauer, of course I read  
2 that, is a manufacturer or works for the Stihl Company.

3 THE COURT: Stihl employee?

4 A. Stihl.

5 BY MR. PACKIN:

6 Q. In what capacity?

7 A. I can't remember if he is the CEO or President, but I  
8 don't recall, as I sit here, exactly what his title was.

9 Q. All right. Do you remember --

10 A. I believe that he was the designer of the machine.

11 Q. Okay. You refer in item number 5 to some additional  
12 depositions that were taken from the Stout matter.

13 A. Yes. Again, Mr. Linsbauer, who's the designer, and Thomas  
14 Elsner, who also was an employee of Stihl who was involved in  
15 design aspects of the machine, including, I think, some of the  
16 warnings that were found on it. And those were also important  
17 in helping me to form my opinion in this case.

18 Q. Okay. Now, you were, as the papers disclose, also the --

19 THE COURT: Mr. Elsner, what's his role there?

20 A. He's a Stihl employee.

21 THE COURT: Okay, they both are.

22 A. Yes.

23 THE COURT: Linsbauer and Elsner. Okay.

24 BY MR. PACKIN:

25 Q. And Mr. Elsner is the one you identified as being involved

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1 with the development of their warnings, correct?

2 A. Yes.

3 Q. Now, in mentioning the Stout case, you were also  
4 Plaintiff's expert on warnings in the Stout matter, correct?

5 A. Yes.

6 Q. Did you have depositions in the Stout matter as well of  
7 co-workers of Mr. Stout, of managerial personnel from his  
8 employer?

9 A. Yes. I had a similar array of depositions. As I sit  
10 here, I can't remember the total number, but there were quite  
11 a few.

12 Q. All right. It would appear, and correct me if I'm wrong,  
13 from the depositions in McGee that are enumerated here and the  
14 depositions in Stout as well, would it be accurate that you  
15 had thousands of pages of sworn deposition testimony from  
16 witnesses that fall into those categories that you described  
17 from both cases?

18 A. Yes.

19 Q. What type of information, in general terms, did those  
20 thousands of pages of depositions inform you about in  
21 connection with your investigation and formulating of opinions  
22 in this case?

23 A. Yes, as briefly as I can.

24 Q. Yes.

25 A. The testimony from the Stihl employees, Messrs. Linsbauer

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1 and Elsner, told me that Stihl recognized that in fact  
2 mounting a toothed blade on the TS 400 was a common misuse of  
3 the product and, in fact, dangerous. It gave me essentially  
4 the basis for what should have been a hazard analysis and  
5 clearly articulating that was a hazard. And staying on that  
6 for a moment, there was a lot of information that I got from  
7 the different deponents in the case that told me about how the  
8 users -- we sort of divided up the deponents in this case, the  
9 users, or supervisors, or maintenance people. The hundreds of  
10 pages that I read on people who actually used the machine gave  
11 me a lot of information on what their expectations are and  
12 what their behaviors were vis-a-vis the Stihl cut-off saw and  
13 how they used it. For example, one of the things that became  
14 clear was that none of them either in this case or in the  
15 previous case actually had read the manual or could say where  
16 the manual was. They hadn't been given a manual. Another  
17 thing that came out of it was that none of them, either in the  
18 current case or the past case, knew that it was an  
19 inappropriate use to mount a toothed blade onto a cut-off saw.  
20 And so that, paired with other information that I got from  
21 them, that it actually could be viewed as an affordance  
22 offered to people the fact that --

23 THE COURT: A what?

24 A. An affordance, A-F-F-O-R-D-A-N-C-E. It's a generally  
25 accepted term in human factors and the perception literature

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1 that when the concept is applied it means that it is for. So  
2 for example, as it relates specifically to this case, as I  
3 mentioned earlier, there are two kinds of authorized types of  
4 wheels to go onto the TS 400, the composite blade and the  
5 diamond tip blade, both of which are to be mounted on a 20  
6 millimeter arbor; that is, that's what drives the saw blades.  
7 Both of them can be mounted with the use of, for example, a 20  
8 millimeter reducing bushing, if that's necessary, and that's  
9 quite similar to the hole that would be found in a toothed  
10 blade. You could easily mount it on it as well. So there's  
11 nothing intuitive about the machine itself that would prevent  
12 a person from knowing that that's an unauthorized use. That's  
13 another example of information that I was able to glean from  
14 the depositions.

15 BY MR. PACKIN:

16 Q. Now, the depositions of Mr. Linsbauer and Elsner, you told  
17 us substantively one of the things that you drew from that  
18 about it was a common misuse to put saw blades on these saws,  
19 did they indicate in that testimony -- did that testimony  
20 provide you with any information as to whether they were aware  
21 of that at the time Mr. McGee's saw was manufactured?

22 A. Yes, I think that it clearly states that they were aware  
23 of that, and I think that is also supported by the fact that  
24 they included a warning about that in the manual; that if you  
25 look at Stihl's website for the cut-off tool itself, that's

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1 the only hazard that they warn about on every single page in  
2 the sections on cut-off saws, including marketing ones inside  
3 a bolded border around that.

4 Q. Okay, we'll get to the website in a moment. Did the  
5 deposition testimony of Mr. Linsbauer and Elsner inform you in  
6 any way as to whether they felt that that misuse of the saw  
7 was dangerous at the time this saw was manufactured?

8 A. Yes, it was very clear that they said that it was a common  
9 misuse and it was dangerous.

10 Q. And known to them at that time?

11 A. And known to them at that time.

12 Q. Now, when someone in your field of expertise is consulted  
13 to design a warning system for a product, would you typically  
14 have --

15 THE COURT: Just a second. I'm sorry to interrupt  
16 you. I only do it when I must. You just testified, sir, it  
17 was very clear from all this material that you reviewed that  
18 Stihl said it was a common misuse, putting this wrong blade  
19 on?

20 A. Yes.

21 THE COURT: And dangerous to do that?

22 A. Yes.

23 THE COURT: And that this was known to Stihl at that  
24 time? Counsel, what time are we talking about? 2003, when  
25 this machine is sold, or 2007, at the time of the accident?

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1 MR. PACKIN: I specifically focused on 2003 at the  
2 time it was sold.

3 THE COURT: Okay. Keep going.

4 BY MR. PACKIN:

5 Q. Did the deposition testimony of Mr. Linsbauer indicate  
6 whether these same criteria were known to them at the time the  
7 TS 400 --

8 MR. WALSH: Your Honor, I am going to object. I  
9 think what we're doing here is we're summarizing. I don't  
10 think that's what the testimony says at all, and I would ask  
11 that if Mr. Packin is going to summarize it, that he produce  
12 the deposition he's referring to. I think it says something  
13 very different from that.

14 MR. PACKIN: Your Honor --

15 THE COURT: Sir, you can continue with your  
16 interrogation. You're asking what Dr. Kalsher recalls from  
17 what he reviewed.

18 MR. PACKIN: Thank you, Your Honor.

19 THE COURT: And that's as much as this testimony  
20 means right now, Mr. Walsh, to answer your objection.

21 BY MR. PACKIN:

22 Q. Was there any indication as to whether this information  
23 was known to Mr. Linsbauer at the time the TS 400 model was  
24 actually designed?

25 A. I think that he did indicate that it was known at the time

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1 when they designed it that this was a common misuse that was  
2 dangerous.

3 Q. Now, I think you indicated that's consistent with what you  
4 saw in the manual and on the website, correct?

5 A. Yes.

6 Q. Okay. Now, when someone in your field of expertise is  
7 called upon to design a warning system for a manufacturer or  
8 to analyze a manufacturer's warning system, would you  
9 typically have as much information as was available to you in  
10 this case through these thousands of pages of deposition  
11 testimony from users, purchasers, supervisory personnel, and  
12 designers?

13 MR. WALSH: Objection.

14 THE COURT: Over-long, compound.

15 MR. WALSH: Objection. It also lacks foundation.

16 THE COURT: Well, let's hear another question. I'm  
17 allowing you to remain seated. We wouldn't normally do that,  
18 but if you're more comfortable and it moves you along, you may  
19 do that.

20 MR. PACKIN: Thank you, Your Honor.

21 BY MR. PACKIN:

22 Q. In your field, when you do an evaluation or analysis of  
23 warnings, and you've indicated also in some cases you've been  
24 asked to prepare warnings, correct?

25 A. Yes.

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1 Q. Have you ever had deposition testimony, hundreds of pages  
2 of deposition testimony of actual users regarding their  
3 experience with the product?

4 A. No.

5 MR. WALSH: Objection, Your Honor. Lacks  
6 foundation.

7 THE COURT: Well, he's had a lot of testimony from  
8 users, overruled. What it says, we shall see.

9 BY MR. PACKIN:

10 Q. Have you ever had available to you the deposition  
11 testimony as to how users have interfaced with the warning  
12 system of a product when you've done your evaluations, other  
13 than the litigation context?

14 A. No.

15 Q. Have you ever had -- strike that. In doing your  
16 evaluations in your field of expertise not in the litigation  
17 context, would you have available to you deposition testimony  
18 from people who designed the product?

19 THE COURT: I'm sorry, that question is unclear. We  
20 have much published material listed in the CV. The aspect of  
21 actually Dr. Kalsher designing a warning hasn't really been  
22 covered except fleetingly.

23 BY MR. PACKIN:

24 Q. Okay, have you designed --

25 THE COURT: I know what it is because it was in the

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1 dep, but --

2 BY MR. PACKIN:

3 Q. You have designed warnings, have you not?

4 A. Yes.

5 Q. Tell me for what types of products you've designed  
6 warnings, please.

7 A. I've designed warnings in my research for a number of  
8 different products. For example, in a series of studies that  
9 I was looking at behavioral compliance, and we used a warning  
10 that would be placed on a circular saw that was never really  
11 operated, but again, the point was to produce a realistic  
12 situation in which they could see it. So I developed a  
13 warning for that.

14 THE COURT: But these are basically behavioral  
15 studies?

16 A. The one I just mentioned, yes.

17 THE COURT: Right. With the exception of that.

18 A. If I just may add on, Your Honor, when I say behavioral  
19 studies, there are actually several different indices that we  
20 look at: noticing, comprehension, recall and behavioral  
21 compliance. I'm grouping those just for purposes of  
22 efficiency that I will call those behavioral.

23 THE COURT: But these are made up warnings that  
24 don't leave the lab?

25 A. The ones I'm describing to you are ones that I would

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1 research and that I would publish in a paper, so they would --

2 THE COURT: Right.

3 A. -- actually get outside the laboratory in terms of a peer  
4 review publication.

5 THE COURT: Right, but they don't get into the  
6 industry. In other words, these are not warnings on products  
7 or desks in workplaces, they are designed studies.

8 A. Yes, that's true.

9 THE COURT: And then you publish the result of your  
10 designed study?

11 A. Yes, Your Honor.

12 THE COURT: Good. Okay. So we know what that is.

13 A. Right. I have designed a warning that actually was placed  
14 on a machine. It was designed to address the hazard of a  
15 cutting hazard for a machine manufactured by the company  
16 Ranpak. They hired me to go --

17 THE COURT: R-A-N --

18 A. P-A-K.

19 THE COURT: -- P-A-K. This is a cutting machine?

20 A. Yes.

21 THE COURT: Okay. And that was a pictorial?

22 A. It was a warning. It was not a pictorial, it was a  
23 warning to go on the machine itself to warn -- it did have a  
24 pictorial in it, but it was a complete warning.

25 THE COURT: And that was not in the context of

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1 litigation. This is the manufacturer asked you to design that  
2 label for them?

3 A. Yes, Your Honor.

4 THE COURT: That warning. So it was text and  
5 pictorial, right?

6 A. Yes.

7 BY MR. PACKIN:

8 Q. You had also mentioned earlier that you were retained to  
9 prepare training materials for Dominos Pizza?

10 A. Yes, sir.

11 Q. When you say training materials, what are you referring  
12 to?

13 A. Again, I kind of alluded to it earlier, it was for driver  
14 safety training, so it was a multi-chapter manual that was  
15 used as part of their training programs for their drivers.

16 THE COURT: Okay, Counsel, let's go on to this case.

17 BY MR. PACKIN: Now --

18 THE COURT: I think the theme was when he evaluates  
19 warnings or prepares warnings, has he had such a large volume  
20 of material from the workplace.

21 BY MR. PACKIN:

22 Q. From the various sources that you've identified, those  
23 types of sources.

24 A. No.

25 Q. Did having those materials in any way add to your ability

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1 to evaluate the warning system in this case?

2 A. Yes.

3 Q. You list further on the report that you had Jingoli's cut-  
4 off saw orientation and their health and safety manual. What  
5 were those, briefly said, and what did they provide you with?

6 A. Sure. They provided me with a brief introduction to the  
7 kinds of safety related information that they would put out.  
8 They were both relatively brief, general instructions for  
9 them.

10 Q. What was your understanding, if you had one, as to the  
11 chronology of that cut-off saw orientation document?

12 A. It's my understanding that that was produced after this  
13 accident.

14 Q. To your understanding, was there any such orientation  
15 document in existence at Jingoli before Mr. McGee's accident?

16 A. It's my understanding that it was not.

17 Q. You also had a topographical map of GROWS landfill. What  
18 did that provide you with by way of information?

19 A. Again, just some background information on the context in  
20 which the accident occurred.

21 Q. You had some information from Sander Power Equipment  
22 that's referenced. What did that provide you with?

23 A. Generally, the information that I got that's related to  
24 Sander Power Equipment was the kind of safety information that  
25 was available through them. For example, there was a pamphlet

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1 that they had separately from the manual that they would  
2 attach to the saw. And they also had a DVD that outlines  
3 technical information about the saw, how to use it, and it  
4 includes a specific part that's directly relevant to what  
5 we're talking about here, which is the issue of kickback.

6 THE COURT: So these materials were not prepared by  
7 the Stihl Company, they were prepared by the intermediary,  
8 Sander?

9 A. I'm not sure who prepared the brochure. I'm not sure if  
10 that was Stihl or Sander, but I think Sander is just the  
11 distributor of these materials, not the developers of them.

12 BY MR. PACKIN:

13 Q. Did you see the DVD?

14 A. I did see the DVD.

15 Q. Physically as a DVD. And did you also watch it?

16 A. Yes, I did.

17 Q. Okay. According to what the DVD indicated facially, who  
18 manufactured or distributed that DVD?

19 A. Stihl.

20 THE COURT: Two questions.

21 BY MR. PACKIN:

22 Q. Who manufactured the DVD?

23 A. Stihl.

24 Q. To your understanding in this case, was that DVD something  
25 that was supplied with the TS 400 as part of the risk

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1 communication materials?

2 A. No.

3 THE COURT: When you say the TS 400, are we talking  
4 about the machine as it was distributed in the marketplace at  
5 the time this particular machine was sold?

6 BY MR. PACKIN:

7 Q. In 2003, when this particular machine was sold, to your  
8 understanding, was that DVD made part of the materials, the  
9 information and warning materials distributed with it by  
10 Stihl?

11 A. No. I think the evidence in the case shows that it was an  
12 accessory that could be purchased for about five bucks.

13 Q. And --

14 MR. WALSH: Objection, Your Honor. We are again  
15 misstating what the record is. There's no indication in this  
16 record that DVD was available in 2003.

17 MR. PACKIN: Your Honor --

18 THE COURT: Okay, thank you.

19 MR. PACKIN: -- if I may say, objections that would  
20 be appropriate for cross examination but don't have a  
21 foundation as objections just are using up time we need to  
22 keep this concise. I mean, that's a contested point.

23 THE COURT: Mr. Packin, if there's a question  
24 without a basis in the record, that's a suitable ground for  
25 objecting, even during your so-called direct which of course

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1 we're allowing you to proceed very much by leading questions  
2 in order to save time.

3 MR. PACKIN: Understood. But as I understood that  
4 objection, it was that there's a disagreement as to when the  
5 DVD was produced. That's something that's a subject for cross  
6 examination.

7 THE COURT: Overruled.

8 BY MR. PACKIN:

9 Q. Was there -- strike that. You indicated various black and  
10 white and color photographs. What did those materials provide  
11 you with in the way of information about this case.

12 A. Sure. I had a variety of photographs about the accident  
13 site, the saw itself, about the label, the general accident  
14 site, what was happening at the time. There was a lot of  
15 background information.

16 Q. Okay. And you list in --

17 THE COURT: Let's move on, Counsel. You just  
18 covered something you already covered, so I'm just urging you  
19 to move on.

20 MR. PACKIN: I'm not sure what I had already  
21 covered.

22 THE COURT: Dr. Kalsher had already been asked by  
23 you what photographs he reviewed, and he cited the police  
24 report and a few other sources of photographs, and now your  
25 same question was asked and he gave the same answer.

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1                   MR. PACKIN: Okay. I'm sorry if there was some  
2 confusion.

3 BY MR. PACKIN:

4 Q. Were these photographs in addition to the police  
5 photographs?

6 A. Yes, I had more.

7 Q. Okay. Taken by whom, to your understanding?

8 A. I don't recall who they were taken by.

9 Q. And you list in item #11 information presented at Stihl's  
10 website, correct?

11 A. Yes.

12 Q. Okay. How did you obtain that information?

13 A. I went on the internet and looked at the site.

14 Q. All right. Did you have any printed material from the  
15 Stihl website that had been printed before you did that?

16 A. I have my file. I don't recall if I had that in my file  
17 or when. I don't remember. I did look at the Stihl website.

18 Q. And just briefly speaking, how did that material inform  
19 you in terms of this case?

20 A. Well, in several ways. One, and parallel to what I've  
21 already testified about as to the owner's manual, there's  
22 information that's associated with the cut-off saws. And the  
23 specific thing that strikes me that stood out was the fact  
24 that on all of the pages regarding the cut-off saw, the only  
25 hazard that is explicitly warned about is what we're talking

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1 about, the inappropriate mounting of toothed saw blades onto  
2 the TS 400 or on the cut-off saws.

3 Q. And you list various ANSI standards in item #12 that you  
4 had to review. Why did you review those and what did those  
5 inform you about with regard to this case?

6 A. Well, these were standards that pertained to cut-off saws.  
7 If we look at B7.5-1990, and then I got the one that actually  
8 came out in 2006 just to look at it, but there were a couple  
9 of things about the B7.5 standard that were important to my  
10 opinion. One was it's a 1990 standard that it's my  
11 understanding was withdrawn by ANSI in 2000 because they  
12 hadn't updated the standard per ANSI's requirement. Just by  
13 way of a quick diversion, for the ANSI Z535 standard, we  
14 regularly revise and update it. It was first published in '98  
15 and revised in 2002, and so on. Secondly, what was important  
16 about that as it relates to my opinion is that like many  
17 voluntary standards, when you look at the foreword of that, it  
18 clearly --

19 THE COURT: When you look at the --

20 A. The foreword to it. It clearly articulates that voluntary  
21 standards don't have the force of law, but they also don't  
22 restrict the use of maybe more detailed kinds of information  
23 that would be relevant to safety kinds of concerns.

24 THE COURT: In other words, they don't set the  
25 ceiling either?

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1 A. Correct. They establish, as many consensus standards do,  
2 they basically cite what is going to be agreeable to the whole  
3 committee. For example, the Z535, there are more than 30  
4 people on that, and so it's a consensus standard. So it's the  
5 minimal kinds of requirements that that group can agree to.

6 MR. PACKIN: Your Honor, I'm going to ask permission  
7 to mark as P-5 a blowup of the preface page from ANSI B7.5.

8 THE COURT: What are you marking this?

9 MR. PACKIN: I believe we're up to P-4. It might be  
10 P-5.

11 THE COURT: Just a second, please. We are at P-5.  
12 Do you want to mark it P-5?

13 MR. PACKIN: Yes, Ma'am.

14 (Plaintiff's Exhibit-5 marked for identification)

15 THE COURT: Okay. And although you have a blowup on  
16 the board, I assume you'll provide us with a paper copy as  
17 well?

18 MR. PACKIN: Yes, Ma'am.

19 THE COURT: Okay, P-5. Any objection, Mr. Walsh?

20 MR. WALSH: May I take a quick look at it, Your  
21 Honor?

22 THE COURT: Take a look.

23 MR. PACKIN: That's the whole page photocopied and  
24 enlarged.

25 MR. WALSH: No objection, Your Honor.

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1           THE COURT: Okay. So just for the record, this is  
2 preface page to what ANSI standard?

3           (Plaintiff's Exhibit-5 admitted into evidence)

4           MR. PACKIN: That would be B7.5.

5           THE COURT: B7.5?

6           MR. PACKIN: Yes, Ma'am. And 7.5-1990.

7 BY MR. PACKIN:

8 Q. And Dr. Kalsher, I'll just hold up the paper copy from  
9 which it was made. Same page, correct?

10 A. Yes.

11 Q. Okay. And can you read for us the language you're  
12 specifically referring to that you just mentioned a moment  
13 ago?

14 A. Yes. Starting on the fourth line, "The existence of an  
15 American National Standard does not in any respect preclude  
16 anyone, whether he has approved the standard or not, from  
17 manufacturing, marketing, purchasing, or using products,  
18 processes or procedures not conforming to the standard."

19 Q. Thank you, sir. Now, I believe you've indicated that your  
20 research in this case showed that this standard -- by the way,  
21 for the record, the title of this B7.5-1990 was Safety Code  
22 for the Construction, Use, and Care of Gasoline Powered Hand-  
23 Held Portable Abrasive Cutting-Off Machines. I believe it was  
24 your testimony that your research in this case disclosed that  
25 that standard had been withdrawn by ANSI.

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1 MR. WALSH: Objection. Leading.

2 THE COURT: He's just recapping. It's already been  
3 testified here.

4 A. Yes.

5 THE COURT: Dr. Kalsher said in the year 2000 this  
6 particular standard was withdrawn by ANSI because it hadn't  
7 been updated in the regular cycle.

8 A. Yes.

9 THE COURT: Is that what you said?

10 A. That's correct.

11 BY MR. PACKIN:

12 Q. Was there ever a successor to it, from your research, that  
13 was enacted or published?

14 A. It's my understanding there was one published in 2006.

15 Q. Okay. That would be three years after this particular  
16 machine was sold?

17 A. Yes.

18 Q. All right.

19 A. That's my understanding.

20 Q. To your understanding, was there any ANSI standard  
21 specific to hand-held cut-off saws between 2000 and 2006?

22 A. No.

23 Q. Now, that's the information that you've listed in this  
24 matter, correct?

25 A. Yes, sir.

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1 Q. And your involvement in the Stout case preceded this case,  
2 is that correct?

3 A. Yes.

4 Q. And in the Stout case, was the cut-off saw that was  
5 involved in Mr. Stout's accident the same make and model of  
6 cut-off saw?

7 A. Yes.

8 Q. Was the blade that was on the cut-off saw the same make  
9 and model of blade; that is, an Oldham 14-inch 24 tooth  
10 carbide tip saw blade?

11 A. Yes.

12 Q. And did both accidents involve, as you understood it, a  
13 kickback scenario?

14 A. Yes.

15 Q. And did both result in facial injuries?

16 A. Yes.

17 Q. Did you rely upon materials that you had from the Stout  
18 case, as well as the research and work you had done in the  
19 Stout case, when you formulated your opinions in this matter?

20 A. Yes, because although there were certainly differences in  
21 what they were doing at the time, they both involved the same  
22 model of saw, the same model of blade, and it involved, for  
23 the most part, the same general kind of hazard, which is a  
24 potential for kickback.

25 THE COURT: Because of the general similarities, in

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1 other words, right?

2 A. Yes.

3 THE COURT: With recognition that there were some  
4 differences?

5 A. Yes.

6 BY MR. PACKIN:

7 Q. When you undertook to write your report in this case, did  
8 you feel that from the materials submitted to you in this  
9 case, together with the materials you had from the Stout case,  
10 as well as your background, education, and training in the  
11 field of warnings and risk communication, that you had  
12 adequate material to analyze the warning system and reach  
13 opinions?

14 A. Yes.

15 Q. If you had not, would you have undertaken to issue your  
16 report, formulate your opinions and issue your report?

17 A. No.

18 Q. Now, you've testified already that in this case, the  
19 yellow label that was intended to be on the blade cover of Mr.  
20 McGee's TS 400 was missing, correct?

21 A. Yes.

22 Q. Did you have any photographs of Mr. McGee's accident saw  
23 that showed that it was missing?

24 A. Yes. I've already stated that earlier.

25 Q. Okay. Now, in the materials you had to review, did you

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1 have available to you a representation or facsimile of what  
2 that label contained, had it been on the saw?

3 A. Yes.

4 Q. And did you also have that information from the Stout case  
5 as well?

6 A. Yes.

7 Q. Now --

8 THE COURT: When you started working on this case,  
9 sir, was the Stout case still an open file in your office or  
10 do you remember?

11 A. I don't remember when that one settled, to be honest with  
12 you.

13 THE COURT: It's not an open file in my office, I  
14 can tell you that.

15 MR. PACKIN: There are lucky breaks.

16 THE COURT: This is the case we have.

17 BY MR. PACKIN:

18 Q. What components of Stihl's warning system did you evaluate  
19 in this case?

20 A. We talked about some of them already. Obviously, I looked  
21 at the warning labels, the labels intended to serve as  
22 warnings on the product. I looked at the material contained  
23 in the manual that was supposed to come with it.

24 THE COURT: The contents of the manual?

25 A. Contents of the manual. I evaluated the DVD, the

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1 presentation of the information that would come on the DVD. I  
2 evaluated the Stihl website and the information contained at  
3 the Stihl website as the primary components of the warning  
4 system.

5 BY MR. PACKIN:

6 Q. Did you evaluate them both individually and collectively,  
7 individually as units of the system and collectively as the  
8 system itself?

9 A. Yes.

10 MR. PACKIN: Now, Your Honor, were we in the  
11 presence of the jury and presenting this case, I would ask him  
12 to go through the individual opinions that he's rendered in  
13 this case and tell the jury what those opinions were. Since  
14 we are here in a different context, we all know what the  
15 opinions are. They're in his report, his report is in  
16 evidence. So what I would like to do is just go to the  
17 opinions, what otherwise would be a leading question if there  
18 was a jury here, and ask him about his basis of arriving at  
19 each one of those. It'll save us a significant amount of  
20 time.

21 THE COURT: Any objection?

22 MR. WALSH: No objection, Your Honor.

23 THE COURT: Okay, fine. Let's do it that way. This  
24 is a 12-page report. Most of it is under the category  
25 "Findings and Opinions," starting on page 2. Mr. Packin, I'll

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1 give you latitude to do what you want. I think the first  
2 question would be, "Do you adopt this as your report today?  
3 Is there anything that you would add or change about the  
4 report?"

5 MR. PACKIN: Fair enough.

6 THE COURT: And then you can hit the highlights  
7 without having to basically have us do verbatim the whole  
8 report. And in the process you can demonstrate through your  
9 questioning what the witness says is the basis for these  
10 highlighted conclusions.

11 MR. PACKIN: Thank you.

12 THE COURT: Is that all right?

13 MR. PACKIN: Yes, Ma'am. And fortunately, because  
14 Oldham is no longer in the case, there are portions of those  
15 12 pages that don't apply to this hearing.

16 THE COURT: Okay. Reviewing the expert report  
17 content.

18 BY MR. PACKIN:

19 Q. Dr. Kalsher, I believe your report of November 9, 2009 was  
20 marked as P-4, is that correct?

21 THE COURT: It's P-4 in evidence. Let me just  
22 double check that, Counsel.

23 BY MR. PACKIN:

24 Q. Do you have it in front of you? Oh, I'm sorry, I have it.  
25 Yes, P-4. Do you have a copy of it in front of you, sir?

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1 A. Yes.

2 Q. It's dated November 6, 2009 and consists of 12 pages, 12  
3 numbered pages, 11 and a half of content?

4 A. Yes.

5 Q. Does that report fairly and accurately represent the  
6 opinions you arrived at in this matter after reviewing the  
7 materials we've already discussed at length and based upon  
8 your education, experience, and training in the field of  
9 warnings and risk communication?

10 A. Yes.

11 Q. Any opinions you would delete from that report?

12 A. No.

13 Q. Any opinions you would add to that report?

14 A. Not necessarily, no.

15 Q. Let's go then to some of the opinions you've reached or  
16 expressed. In your report on page 5, you indicate that ANSI  
17 Z535, first published in 1992 with other revisions --

18 A. 1991.

19 Q. 1991, I'm sorry.

20 THE COURT: Are we on page 5?

21 MR. PACKIN: Yes, Ma'am.

22 THE COURT: Okay.

23 BY MR. PACKIN:

24 Q. Reflects principles derived from the research and writings  
25 and warnings. Is that accurate, sir?

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1 A. Yes.

2 Q. And what do you base that on? What do you base the  
3 statement that the ANSI Z535 reflects that?

4 A. For example, there are ideas in it that suggest ways to  
5 format the warning and the information that should be  
6 contained in a warning. For example, it should clearly state  
7 what the hazard is, what the likely consequences are and the  
8 severity, and what one would need to do to avoid the hazard.

9 Q. Did ANSI -- strike that. Even were ANSI B7.5-1992 had  
10 still been in effect in --

11 THE COURT: {Dash} 1990?

12 MR. PACKIN: Yes, ma'am.

13 THE COURT: You said 1992.

14 MR. PACKIN: No, ANSI B7.5-1990 is the standard.

15 THE COURT: You misspoke and you said 1992.

16 MR. PACKIN: Oh, I'm sorry, I'm sorry.

17 BY MR. PACKIN:

18 Q. Even were ANSI B7.5-1990 to have been in effect in 2003  
19 when this saw was sold, did B7.5-1990 preempt in any way the  
20 applicability of Z535?

21 A. No.

22 Q. And what do you base that on, sir?

23 A. Because first of all, as we looked at earlier on your  
24 display, the foreword clearly indicates that it doesn't  
25 preclude such a thing. The other thing I would point to is

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1 that the ANSI standard clearly indicates that the goal of the  
2 ANSI Z535 Committee is to provide a uniform design for how one  
3 designs and presents warnings on labels on products. And it  
4 also indicates that it's hoped that the recommendations in  
5 ANSI will be adopted by other ANSI standards and, in fact,  
6 nationally.

7 Q. On page 11 of your report you state that it's Stihl's  
8 reliance, based on the documents we've reviewed, only or  
9 primarily on ANSI B7.5-1990 or B175.4-2006 for its warnings,  
10 ignores the significant body of warning science reflected in  
11 ANSI's Z535. What's your basis for that statement, sir?

12 THE COURT: I'm sorry, I lost you. What page are we  
13 on?

14 MR. PACKIN: On page 11.

15 THE COURT: Counsel, when I'm taking notes, it's  
16 helpful if once you give the witness your reference, you pause  
17 for a second, look up, make sure that I'm not still shuffling  
18 papers or finishing my note from the last answer.

19 MR. PACKIN: Will certainly do that.

20 THE COURT: And that will avoid us having to burden  
21 the record with this kind of a little speech from me. Okay,  
22 are we looking at page 11?

23 MR. PACKIN: Yes, Ma'am.

24 THE COURT: Ask your question again.

25 BY MR. PACKIN:

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1 Q. You state that Stihl's reliance only or primarily on B7.5  
2 and B175.4 ignores the significant body of warning science  
3 reflected in ANSI Z535. What is your basis for that  
4 statement, sir?

5 A. Right. There have been many studies done to indicate, for  
6 example, that there are a variety of factors that will  
7 increase the chances that somebody will notice the  
8 information. Highlighting features, such as color, size,  
9 highlighting, are all factors that are important things for  
10 getting people to first notice a warning, and then there are  
11 other things that are also incorporated into Z535 on the  
12 earlier question that you asked, such as recommending the way  
13 that a warning is formatted so that warning messages are  
14 generally short, they define the hazard, the consequences, and  
15 what people need to do to avoid the hazard. There are  
16 formatting characteristics such that if there are multiple  
17 hazards warned about, such as on the yellow label, that they  
18 should be organized with the most severe hazards presented  
19 first. There's information derived from the literature and  
20 embodied in the ANSI Z535 standard that gives recommendations  
21 for the size of lettering under favorable and unfavorable  
22 conditions. So there's a variety of things from the  
23 literature in terms of the physical characteristics of  
24 warnings that would be important. There's also other things  
25 from the literature that would suggest that there are other

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1 considerations that are important as well that would not have  
2 been reflected in the B7.5 standard, such as how one might  
3 locate the warning so that it's prominent at the time somebody  
4 was going to be exposed to the hazard. The literature that  
5 has arrived has been developed since then also talks about  
6 factors that are generally accepted in my field that are  
7 things to watch out for that might blunt the effect of a  
8 warning, such as cost of compliance or things like perceived  
9 risk. It turns out that cost of compliance is an important  
10 concept since it tends to blunt the effects of warnings, and  
11 perceived risk is an important concept because that --

12 THE COURT: Is this in your report?

13 A. My --

14 THE COURT: Cost of compliance?

15 A. I think he was asking me about the principles that I  
16 referred to in my report.

17 BY MR. PACKIN:

18 Q. Yes. Could you explain to the Court briefly what cost of  
19 compliance means?

20 THE COURT: I think we're getting too detailed here.

21 MR. PACKIN: Okay, okay.

22 BY MR. PACKIN:

23 Q. By the way, again, we're operating from the premise that  
24 B7.5 was not in effect at that time. However, you read B7.5,  
25 correct?

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1 A. Yes.

2 Q. And you read it because the testimony, and correct me if  
3 I'm wrong, of the Stihl representatives was that that's what  
4 they relied on in their warnings and constructions --

5 A. Yes.

6 MR. WALSH: Object. Lack of foundation.

7 MR. PACKIN: Is that what --

8 THE COURT: Well, he read it, he read it. Go on.

9 BY MR. PACKIN:

10 Q. Does B7.5 address the issue of warnings on a cut-off saw?

11 A. They address prominently locating safety related  
12 information but they --

13 Q. In any detail?

14 A. No.

15 Q. Now, you've indicated in your report, you rendered the  
16 opinion that Stihl's reliance on B7.54, the design of its  
17 safety communication system, was a defect in their safety  
18 communication system. On what did you base that opinion, sir?

19 A. Yes, because as I indicated in my report, there was other  
20 information available to better design warnings for a variety  
21 of applications, including this one, including Z535, that was  
22 available at this time, and other information that could be  
23 found in the research on warnings.

24 Q. So you were referring to the empirical research and Z535?

25 A. Yes.

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1 Q. Okay. You mentioned a few moments ago that Z535 provides  
2 some enumerated criteria for a properly prepared warning?

3 A. Yes.

4 Q. Okay. Which Z535 are you referring to in that regard?

5 A. All of them would have similar kinds of recommendations,  
6 but because of where this happened in time, I was referring  
7 specifically to Z535 that was published in 2002.

8 Q. Okay. Is that .4?

9 A. Yes.

10 MR. PACKIN: Okay. I'm going to ask to mark as P-6  
11 a blowup of, and we will provide the smaller version, of those  
12 criteria. And I will indicate I typed them, my office typed  
13 them, but they're taken directly from Z535.4.

14 (Plaintiff's Exhibit-6 marked for identification)

15 THE COURT: You're offering this as P-6?

16 MR. PACKIN: Yes, ma'am.

17 THE COURT: Any objection?

18 MR. WALSH: No objection, Your Honor.

19 THE COURT: Subject to you have to double check it  
20 to proofread it to make sure that it's right.

21 MR. PACKIN: Yeah.

22 THE COURT: P-6 in evidence is a page from ANSI  
23 Z535.4 effective 2002.

24 (Plaintiff's Exhibit-6 admitted into evidence)

25 MR. PACKIN: That's the 2002 version actually, yes.

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1 BY MR. PACKIN:

2 Q. Are those the criteria that you were referring to a moment  
3 ago? You don't have to read them all into the record, but are  
4 those the criteria?

5 A. Yes.

6 Q. In your report, you render the opinion on page 2 --

7 THE COURT: Page 2, okay.

8 Q. -- that manufacturers have a duty to warn end users about  
9 the hazards of their products, the likely consequence of  
10 encountering those hazards, and the steps to take to avoid  
11 them. Where do you draw upon for that conclusion, sir?

12 A. Just generally that manufacturers have a duty to warn  
13 about the hazards of their products, in combination with the  
14 recommendations that are embodied in ANSI Z535.

15 Q. Okay. Is that concept reflected in the warnings  
16 literature, as well as Z535?

17 A. Very much so.

18 Q. You indicate going forward on page 4 of the report --

19 THE COURT: Page 4, thank you.

20 Q. -- that the components of the warning system should be  
21 well designed in appearance and content and tested to  
22 determine if they communicate safety-related information  
23 effectively and in a way most likely to result in correct  
24 behavior.

25 THE COURT: Hold on just a minute.

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1 A. Where are you at on page 4, sir?

2 MR. PACKIN: That's page 4.

3 A. Oh, I see.

4 THE COURT: Yes.

5 A. I'm with you. I see it.

6 THE COURT: Components of a warning system?

7 MR. PACKIN: It's the third block of material on  
8 page 4, and it starts about four or five lines down.

9 THE COURT: One moment. I'm going to type this into  
10 my notes and then we can discuss it. I'll tell you when I'm  
11 ready.

12 (Pause in proceedings)

13 THE COURT: I'm not winning any speed test today.

14 (Pause in proceedings)

15 THE COURT: Okay. So you had that quote. Go ahead.

16 BY MR. PACKIN:

17 Q. On what did you base that opinion that you've rendered  
18 about them being well designed in appearance and content and  
19 tested to determine if they communicated --

20 A. Sure. One of those --

21 Q. I'm sorry, communicate effectively. Go ahead.

22 A. Yes. One of them has to do with testing these against  
23 recommendations made in standards such as Z535. For example,  
24 as I've already said, there's guidance in there for how one  
25 would construct a message, the use of an appropriate signal

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1 word, the use of color, the use of pictorials, how one would  
2 organize the information, how one would construct the specific  
3 statements and the messages, other kinds of physical  
4 characteristics such as the use of color, size, contrast in  
5 order to accommodate where people would be seeing this and so  
6 on. And also based on the findings and the literature for  
7 other kinds of characteristics known to increase the  
8 effectiveness of warnings, and I refer to that as in  
9 behavioral research that incorporates the various functions of  
10 a warning. For example, that it needs to inform people, it  
11 needs to tell people about the hazard at the time it's most  
12 critical, and to remind them about it, those kinds of things  
13 that we talked about earlier. And there was evidence in the  
14 literature to suggest that there were recommendations for  
15 doing this in order to increase the effectiveness of warnings.

16 Q. On page 3 you render the opinion that hazards associated  
17 with the use of cut-off saws have been known for many years.  
18 On what did you base that statement and conclusion?

19 A. From the testimony of Messrs. Linsbauer and Elsner, it was  
20 clear that they had known about this specific hazard for a  
21 number of years, certainly before these accidents occurred.

22 Q. On page 2 of your report you render the opinion --

23 THE COURT: Be right there. Page 2?

24 MR. PACKIN: Yes, Ma'am.

25 THE COURT: Uhm-hum.

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1 BY MR. PACKIN:

2 Q. That Mr. McGee's misuse of the saw by mounting a carbide  
3 tip saw blade on it and cutting plastic pipe with it was  
4 reasonably foreseeable and actually foreseen.

5 A. Yes. Again, that come --

6 Q. Excuse me. On what did you base that statement?

7 A. Again, that comes from the deposition testimony of Mr.  
8 Linsbauer and Elsner that suggested that it was well known to  
9 them at the time that people were commonly misusing their saws  
10 and it was a dangerous practice by mounting them with --

11 Q. Was it based --

12 A. -- toothed blades.

13 Q. Was any part of that opinion based on the content of the  
14 manual?

15 A. Sure.

16 THE COURT: Based on what?

17 MR. PACKIN: The content of the manual.

18 A. Yes, the manual clearly outlined that the use of carbide  
19 saws on these -- carbide tip blades on these saws was a  
20 dangerous misuse.

21 BY MR. PACKIN:

22 Q. Did the inclusion of that in the manual give you any  
23 indication that it was foreseen by Stihl at the time this saw  
24 was made?

25 A. Yes, otherwise I don't think that they would have spent as

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1 much time and effort on putting that specific warning across  
2 several different pages. And in fact, if you go to the  
3 website, and we're not on that yet, it's the only warning  
4 that's on every page of the cut-off saw portions of their  
5 website.

6 Q. All right. Now, we know from your report and from the  
7 materials there was an item addressing that wood cutting saw  
8 blade or toothed saw blade use on the label that was missing  
9 from the saw at the time of the accident, correct?

10 A. Yes.

11 Q. Did that indicate to you in any way -- was that in any way  
12 supportive of your conclusion that this misuse was reasonably  
13 foreseeable and actually foreseen?

14 THE COURT: Okay, this yellow label, just for the  
15 record, what does it show? Do you have one handy?

16 MR. PACKIN: May I mark that as P-7, Your Honor?

17 THE COURT: Go right ahead.

18 (Plaintiff's Exhibit-7 marked for identification)

19 THE COURT: Is that it, Mr. Walsh? Do you object?

20 MR. WALSH: We have no objection. Mr. Packin showed  
21 it in my direction. It appears from here to be correct.

22 THE COURT: Okay, P-7 in evidence is a blowup of the  
23 yellow label.

24 (Plaintiff's Exhibit-7 admitted into evidence)

25 BY MR. PACKIN:

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1 Q. Now, Dr. Kalsher, just to point my finger over to the left  
2 side of the Courtroom, that yellow label that you see on the  
3 cover of the exemplar machine that's on counsel table, your  
4 understanding that P-7 is a blowup of that?

5 A. May I take 10 seconds to look at it? I just want to --

6 Q. I'll bring it over.

7 A. I want to be sure.

8 THE COURT: Actually, Counsel, for safety purposes -  
9 -

10 A. May I see that?

11 THE COURT: -- would you please represent for the  
12 record what you're holding and what condition it's in?

13 MR. WALSH: Your Honor, since that is an exhibit we  
14 brought, that is an exemplar TS 400. It is in new condition.

15 UNIDENTIFIED SPEAKER: (Indiscern.).

16 MR. WALSH: I'm sorry?

17 UNIDENTIFIED SPEAKER: (Indiscern.).

18 MR. WALSH: I'm sorry. It is an exemplar TS 400.

19 It is in new condition. It does not have gas or oil in it.

20 It is an operable machine, if it was fully fueled, but

21 otherwise it's not, and it is equipped with a composite wheel,

22 cutting wheel, which should provide no essential hazard to

23 anyone.

24 THE COURT: Okay. Are we going to stipulate to let  
25 this machine into evidence as P-8 in evidence? Do you mind?

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1 MR. WALSH: I don't know if it was being offered in  
2 evidence. Was it?

3 THE COURT: Well, anything in the Courtroom that we  
4 are testifying --

5 A. I just wanted to take a quick --

6 THE COURT: Just a second, sir.

7 A. Oh, I'm sorry.

8 THE COURT: If there's going to be testimony at all  
9 in the Courtroom it's just handy to have a label on it.

10 MR. WALSH: We can mark it.

11 THE COURT: Okay, P-8 in evidence. And now we'll  
12 give --

13 (Plaintiff's Exhibit-8 marked for identification)

14 (Plaintiff's Exhibit-8 admitted into evidence)

15 MR. WALSH: Can I suggest that --

16 THE COURT: -- Dr. Kalsher --

17 MR. WALSH: Can we mark that on the bottom or  
18 someplace so that if we use it or have to re-mark it for trial  
19 that we don't have a lot of labels on it?

20 THE COURT: Perfectly fine. Now, you said yes,  
21 there is a notation at the bottom of this blown up exhibit, P-  
22 7. It says A. Stihl, S-T-I-H-L, 2000. And then it has some  
23 serial number after that.

24 MR. WALSH: I can represent to the Court what I  
25 believe that will refer to. A. Stihl would be Andreas Stihl,

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1    which is a German company that is the designer and  
2    manufacturer of the machine. The serial number is probably,  
3    and I'm guessing here, it's probably a part number for the  
4    label is my guess, but I'm not sure. The 2000 date is  
5    probably the release date of that particular part.

6           THE COURT: Thank you, sir.

7           MR. PACKIN: Just for the record, I just checked,  
8    both the actual size label that's on the saw we marked and the  
9    blowup have the same 2000 release date. The only difference  
10   in the serial number is the one on the blowup, the last two  
11   numbers or letters are XX, and on the one that's on the saw,  
12   instead of the XX it's SD.

13          THE COURT: You may proceed.

14   BY MR. PACKIN:

15   Q. On page 2 you render the opinion that the use of a cut-off  
16   -- excuse me. Going back to the portion of page 2 we were  
17   just referring to, where did you get the -- what was your  
18   basis for reaching the conclusion that using the carbide tip  
19   saw blade to cut plastic pipe was something that was foreseen  
20   by Stihl?

21          THE COURT: Where are we now?

22          MR. PACKIN: Page 2, the same portion we were on  
23   when we started marking this.

24          THE COURT: Okay, just a second. Using a saw to cut  
25   plastic pipe was a foreseen use, right?

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1 MR. PACKIN: Yes.

2 MR. WALSH: Where is that here? I'm sorry.

3 MR. PACKIN: Page 2. It says --

4 (Pause in proceedings)

5 MR. WALSH: Your Honor, I may be missing it, but I  
6 don't see anything in there that indicates the cutting plastic  
7 pipe -- referencing cutting plastic pipe. Maybe I'm missing  
8 it.

9 THE COURT: All right.

10 MR. PACKIN: I don't want to spend too much time on  
11 that, so I'll withdraw that for the moment, the plastic pipe  
12 aspect of it.

13 THE COURT: Okay.

14 BY MR. PACKIN:

15 Q. In the materials you reviewed in this case, did you see  
16 any information or indication that Stihl anticipated their  
17 tool, the TS 400, being used to cut plastic pipe?

18 A. I believe on page 21 of the owner's manual there is a  
19 reference to plastic underneath the discussion of the two  
20 different kinds of blades that can be used on the machine,  
21 that are authorized for use on the machine.

22 Q. On page 2 of the report, you offered the opinion that  
23 there is an increased risk or potential for kickback when a  
24 cut-off saw is used with a carbide tip saw blade.

25 THE COURT: What page are we on?

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1 MR. PACKIN: 2, Ma'am.

2 THE COURT: Okay.

3 A. Could you point me exactly where we're at, Mr. Packin?

4 MR. WALSH: Your Honor, I'm going to voice a general  
5 objection here. We have a report that just has a finding and  
6 opinions section and then has a general narrative. Much of  
7 what Mr. Packin is styling in his questions as opinions are  
8 not opinions this witness is qualified to provide, such as  
9 whether there is an added risk. That may be information he  
10 read, but he's not been presented as an engineering expert,  
11 he's not been presented to give opinions on the dynamics of  
12 the machine. So by having a narrative rather than focusing on  
13 actual discreet warnings opinions, what we're doing, I think,  
14 is turning what are really not opinions on the part of this  
15 witness, not ones he's qualified to give in any event. And so  
16 I think we need to do this a little differently, and we may  
17 have to go back and ask this witness exactly what his opinions  
18 are, as opposed to taking excerpts from a narrative in a  
19 report.

20 THE COURT: It's a long report. I note your  
21 objection, but at least from the standpoint of a somewhat  
22 educated hearing officer, educated by what I have read so far,  
23 I can understand this in context, and I do know where the line  
24 of his asserted expertise is drawn. But I'll keep that in  
25 mind.

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1 MR. WALSH: Very well.

2 BY MR. PACKIN:

3 Q. Perhaps I can ameliorate it a little bit by saying the  
4 conclusion or the statement that you render that there's  
5 increased risk or potential for kickback when a cut-off saw is  
6 used with a carbide tip blade as indicated in the last block  
7 of writing on page 2, where did you draw from in the record or  
8 the materials in this case to reach that conclusion?

9 A. Right. In the manual it states that either a chip blade  
10 that is authorized or the teeth of a cutting blade such as  
11 we're talking about here can get caught in the material being  
12 cut and thereby increase the chance for kickback.

13 Q. So from the materials in the actual owner's manual?

14 A. Yes.

15 Q. Published by Stihl?

16 A. Yes.

17 THE COURT: But to the degree that we can move along  
18 to the actual opinions regarding the warnings, that would be  
19 good.

20 MR. PACKIN: Yes.

21 BY MR. PACKIN:

22 Q. On page 5 -- strike that, strike that. After making --  
23 yes, on page 5, after making reference to that yellow label  
24 that's on the easel being missing at the time of Mr. McGee's  
25 accident, you state that Section 10 of ANSI Z535.4-2002

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1 addresses expected life and maintenance of warning labels, is  
2 that correct?

3 A. Yes.

4 Q. So in reaching opinions in this case regarding the missing  
5 label, did you rely in part upon what's reflected in ANSI's  
6 Z535.4?

7 A. Yes, because what is stated in there, and I'll just read  
8 it into the record, "Product safety signs and labels shall  
9 have a reasonable expected life with good color stability,  
10 symbol legibility, and word message legibility when viewed at  
11 a safe distance. A viewing distance reasonable expected life  
12 shall take into consideration the expected life of the product  
13 and the foreseeable environment of use." And embodied in the  
14 materials that Stihl itself presented, as well as from the  
15 deposition testimony and other information I read in the case,  
16 it's my understanding that the saws are used in dirty  
17 environments. They're sometimes used with the hose attachment  
18 that could cake on elements that have been grinded, and they  
19 need to be washed and power washed. And in this instance, it  
20 seems like that was a foreseeable use because that's an  
21 expected environment in which the saw will be used. And so  
22 the label, at least according to the recommendation, should  
23 take that kind of environment and use into account, including  
24 the likelihood that people will steam clean or use power  
25 washers to clean the machines.

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1 Q. Okay. And what was your understanding as to the age of  
2 this machine at the time of Mr. McGee's accident when this  
3 label was missing?

4 A. I believe it was about three years old at the time.

5 Q. What was your understanding as to whether three years was  
6 beyond the expected life of this machine?

7 MR. WALSH: Objection. Lack of foundation.

8 THE COURT: So noted.

9 A. Because it's designed to be primarily a commercial or  
10 industrial tool I would expect that it would last three years  
11 or more.

12 BY MR. PACKIN:

13 Q. Was there any indication in the record of materials that  
14 you could see that it was not used in its anticipated  
15 environment?

16 A. No.

17 MR. WALSH: Objection. Lack of foundation.

18 THE COURT: Just a second. Overruled. Just a  
19 minute, please. Let me see you at the side briefly, Counsel.  
20 Sir, if you'd just excuse us, I'm going to talk to them for a  
21 minute.

22 A. May I (indiscern.)?

23 THE COURT: Yes, you may. Sure. Yeah, go ahead.

24 (Sidebar on the record)

25 THE COURT: The one thing about the missing label, I

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1 can understand his testimony about the adequate -- the thing  
2 about the missing label -- step back. Okay. It is not clear  
3 to me what his opinion really is within the area of his  
4 expertise when you talk about the fact that this label had  
5 fallen off this machine. I do understand that he's got  
6 opinions about where the labels should be placed on the  
7 machine and what they should look like, but I don't see an  
8 opinion coming from him that connects up the fact that the  
9 label has fallen off with what was inadequate about the fact  
10 that it was attached the way it was. I just don't understand  
11 that he really draws an opinion on the absence of the label.

12 MR. PACKIN: I believe that the report indicates  
13 that based upon the criteria set forth in ANSI, and the fact  
14 that this was a three-year-old machine used under what in his  
15 opinion were reasonably anticipated conditions of use and  
16 cleaning, that the absence of that label, and he says it later  
17 in the report, left him at the time of the accident with no  
18 warning on the machine at all --

19 THE COURT: Well, that's true.

20 MR. PACKIN: -- regarding this hazard.

21 THE COURT: But what does he say is wrong with the  
22 machine in that the label fell off? I guess what I'm asking,  
23 this is a physical problem. It is not a textural problem,  
24 it's not a conspicuousness problem.

25 MR. PACKIN: Okay.

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1 THE COURT: It's a physical problem. I mean, am I  
2 supposed to use Gorilla Glue, welding --

3 MR. PACKIN: I get the point. Okay.

4 THE COURT: -- and he's not a glue or a welding guy.

5 MR. PACKIN: Correct.

6 THE COURT: He's not here.

7 MR. PACKIN: Correct.

8 THE COURT: So I want you to be very clear on how  
9 much you draw out of him --

10 MR. PACKIN: Okay.

11 THE COURT: -- as to what his opinion is on this,  
12 and then it'll be open to cross examination. But I wanted to  
13 alert you to this.

14 MR. PACKIN: Okay, okay.

15 THE COURT: That missing label, I see it in a  
16 slightly different category than content of labels.

17 MR. PACKIN: Okay. Fair enough.

18 THE COURT: Or even placement of labels on the  
19 machine.

20 (Sidebar ended)

21 THE COURT: You can pick up, Mr. Packin, from right  
22 where we were at the top of page 6.

23 MR. PACKIN: Okay.

24 THE COURT: And where else do you want to go on that  
25 topic in the report.

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1 BY MR. PACKIN:

2 Q. Now, just for the record, do you hold yourself out as an  
3 expert on glues or adhesives?

4 A. No.

5 Q. Your area of expertise is warnings and product safety  
6 communication, correct?

7 A. Yes.

8 Q. Now, the Z535 standard that you've cited here, Z535.4-  
9 2002, that is part of the series on which you sit on the  
10 committee, correct?

11 A. Yes.

12 Q. Do the people who are involved in the warnings field such  
13 as yourself concern themselves with the adhesive or glue  
14 that's used to affix a label to a machine?

15 A. Well, certainly to the extent that it would impact the  
16 effectiveness of risk communications and warnings.

17 Q. Okay. But not as physical science in terms of evaluating  
18 the efficacy of a glue or adhesive, correct?

19 A. No.

20 Q. That's correct?

21 A. That's correct.

22 Q. Okay. So when you look at a label being missing, would it  
23 be correct that your focus is whether it was missing under  
24 expected conditions of use and at a time when a machine was  
25 not of advanced age?

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1 MR. WALSH: Objection. Leading.

2 THE COURT: Yes, that's too leading.

3 BY MR. PACKIN:

4 Q. What factors do you look at if you're not looking at the  
5 glue?

6 A. Sure. As I indicated in my opinion, the point is whether  
7 or not it is going to be on the machine as you expect it under  
8 the expected conditions of use.

9 Q. Okay. In this particular case, from the materials that  
10 you reviewed, was Mr. McGee's accident saw at the time of his  
11 accident the only experience that Joseph Jingoli and Sons had  
12 had with this particular label being missing on Stihl  
13 products?

14 A. No. I talked about that earlier during the day, that in  
15 fact Hoffmaster had testified that they kept stacks of them  
16 because they kept coming off. So it was a common occurrence,  
17 from my understanding of the testimony.

18 Q. How did that factor into your evaluation of the missing  
19 label? Recognizing that you don't have the expertise to  
20 evaluate glues or adhesives, how did that total of information  
21 impact upon the opinion you rendered?

22 A. Well, it's important because, again, I've talked about  
23 some of this earlier, looking from the manufacturer's duty to  
24 warn end users about the product given that they were selling  
25 this primarily for use in construction and the trades, really

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1 the only warnings that they could rely on to actually reach  
2 the end users for some of the reasons I cited earlier, that  
3 it's reasonable to expect that in a construction site when  
4 people don't buy the machines or maintain the machines  
5 themselves, they may not have access or get an owner's manual.  
6 It can't be expected that they're going to look for specific  
7 information on the internet for a specific tool when they  
8 probably use dozens of different kinds of tools. And so it's  
9 important that the actual warning that will be on the machine  
10 when it's going to be used, that it's designed such that it  
11 can reasonably be expected to be there when the person's going  
12 to use it over the predicted life of the machine.

13 Q. And was then the opinion that you reached one drawn just  
14 upon the experience with Mr. McGee's saw or did it draw upon  
15 all of the information you had available to you?

16 MR. WALSH: Objection. Leading.

17 THE COURT: I'll permit it.

18 A. Well, we've already, again, we've already talked about the  
19 fact that I had a myriad of information from both the Stout  
20 case and in the McGee case, so there was a lot of information  
21 I had available to me for this particular subject.

22 BY MR. PACKIN:

23 Q. Okay. From the materials that you had to review,  
24 particularly photographs and deposition testimony, was there  
25 any portion of that label that remained on the blade cover,

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1 either the label itself or any of the material that had been  
2 used to affix it to the blade cover?

3 A. No, it didn't appear that there was any residual glue or  
4 parts of a label left on the side.

5 Q. All right. And then on page 6, in that same line of  
6 writing, you state that, "The fact that the label was missing  
7 from the accident saw, coupled with the fact that it was  
8 missing from other TS 400s owned by Jingoli, illustrates the  
9 failure on the part of Stihl to make this warning label  
10 sufficiently durable to withstand foreseeable conditions of  
11 use." On what did you base --

12 MR. WALSH: Where is he reading? Where are you  
13 reading?

14 THE COURT: Yes, it's in the middle of the second --

15 MR. PACKIN: Yes.

16 THE COURT: -- paragraph, which is the first full  
17 paragraph.

18 MR. PACKIN: Yes, Ma'am. About eight, nine lines  
19 down, "The absence of the yellow sticker," that's the  
20 sentence.

21 A. Okay.

22 THE COURT: And the one before it.

23 MR. PACKIN: Yes, Ma'am. May I proceed?

24 THE COURT: Yes, you may.

25 BY MR. PACKIN:

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1 Q. And I understand we may have covered part of this, on what  
2 did you base that conclusion?

3 A. Sure. I based that on the recommendation in the ANSI  
4 standard that such a label is expected to have an expected  
5 life under reasonable conditions of use. And it's  
6 corroborated by the many depositions that I read that in fact  
7 it came off routinely off of those saws. That's in violation  
8 of that recommendation.

9 Q. Now, you go on on page 6 to state --

10 THE COURT: Just a second. We're looking at --  
11 there is an exhibit, there's a blowup of the Z535  
12 recommendations.

13 MR. PACKIN: We're looking at an exhibit that is a  
14 blowup of the warning label.

15 THE COURT: Go back to P-6, please, that blowup.

16 MR. PACKIN: Yes.

17 THE COURT: It's the ANSI that you typed.

18 MR. PACKIN: This one is -- let me go back to the  
19 microphone. This ANSI blowup, P-6, is not from the standard  
20 that addresses the affixation of labels. This addresses the  
21 content and format of labels. I did not blow up the one that  
22 addresses how they're affixed because it's relatively short  
23 and it's quoted verbatim in Dr. Kalsher's report, if you read  
24 it.

25 THE COURT: Thank you, Counsel. You may move along.

1 MR. WALSH: Your Honor, may I raise an issue here?

2 THE COURT: Yes. Do you want to talk about our  
3 timetable?

4 MR. WALSH: I do want to talk about our timetable.

5 THE COURT: Okay, go ahead.

6 MR. WALSH: We're approaching 1 o'clock, and on our  
7 timetable, I'm not sure exactly where that leaves us, but it  
8 leaves us pretty close to the three hours. I don't know if  
9 Mr. Packin has kept track of time or not, but I do want to,  
10 you know, remind him, because otherwise we're going to run out  
11 of ability to cross examine this witness today.

12 MR. PACKIN: I am running a little longer. There  
13 have been a number of factors. One is I just didn't predict  
14 totally accurately, but also, and this is not a criticism in  
15 any way, there are certain factors that slow it up a little  
16 bit, such as, you know, allowing Your Honor the opportunity to  
17 find the pages and whatnot. I'm a little behind but I --

18 THE COURT: Okay, let's take five minutes.

19 MR. PACKIN: -- I've cut out substantial portions to  
20 get to where we are.

21 THE COURT: Let's take five minutes recess and you  
22 come back and tell us what you currently estimate is what you  
23 need in order to finish, and then I'll see what about a lunch  
24 break. Let's take the five minutes so that you can think.

25 MR. PACKIN: Okay.

1           THE COURT: I always believe in that. Then we'll  
2 come back. But I will let you have lunch at some point.

3           MR. PACKIN: Thank you.

4           THE COURT: Soon.

5           (Court in recess)

6           THE COURT: Thank you. Mr. Packin --

7           MR. PACKIN: I will --

8           THE COURT: -- what's your thought?

9           MR. PACKIN: -- provide the Court with my thought  
10 and analysis of that issue that we left on, and of course Mr.  
11 Walsh will weigh in on it as well. But I will say that we've  
12 had some discussion collaboratively in the hallway. What I've  
13 advised counsel is that I have, in the earnest hope of  
14 finishing today, actually taken significant portions out of my  
15 anticipated questioning, yet we are at a point, can't -- and I  
16 don't think there's been much in the way of repetition;  
17 there's been some, but not a lot. And so we are at a point  
18 where I would say I'm -- and I've estimated for counsel that I  
19 might need an hour to an hour and a half beyond what I had  
20 originally predicted. If we factor in a lunch break, to which  
21 I think everyone is reasonably entitled, it gets us into the  
22 3:30 to 4 o'clock range. I am the first to say that the  
23 Defense should have as much time to cross examination as is  
24 appropriate, and certainly commensurate with the direct  
25 examination. And my own personal feeling, for what it's

1     worth, is it would be an undue burden upon the Court, the  
2     Court staff, the witness, me, and co-counsel to be here 'til 8  
3     o'clock at night trying to finish this.

4             THE COURT: All right, let me hear from Mr. Walsh.

5             MR. PACKIN: But --

6             THE COURT: Oh.

7             MR. PACKIN: Just we had originally had discussions  
8     about it being two days, and perhaps that was more realistic,  
9     given the breadth of material that needs to be covered, as the  
10    Court knows from the breadth of material that was submitted on  
11    the motions, as well as the many pages of depositions. So my  
12    suggestion is that we take a lunch break, although if Your  
13    Honor says we're not, we won't, and that I'll finish up this  
14    afternoon at what is more traditionally a reasonable hour, and  
15    we'll do his cross at another day. It doesn't sound like it  
16    will be tomorrow based on availability of certain of us, as  
17    well as perhaps the Court, but we can do it. And I recognize  
18    that we may then be staggered because we have other witnesses  
19    already scheduled, but we're all pretty bright people, and I  
20    think we can keep track of which one we're on. I think the  
21    Hayes hearing will be a one-day; his opinions are relatively  
22    brief, his scope in the case is relatively brief. Growney is  
23    likely to be more like this one. I think we have a lot to  
24    cover, and it's important to get it done and have the  
25    appropriate record for Your Honor and for the parties.

1           MR. WALSH: Your Honor, we all came down here  
2 knowing what time constraints the Court had imposed on the  
3 hearings, and it is somewhat incumbent, I think, to deal with  
4 that. The notion -- this hearing has been put off a couple of  
5 times. What that does each time, there's a massive amount of  
6 material, as Your Honor knows. When weeks go by between  
7 sessions, I'm no longer of retaining that weeks behind, so  
8 what you do is you end up re-prepping every time you do it and  
9 dragging out all the material and re-prepping, which simply  
10 adds to the cost of this litigation, which already is  
11 extremely expensive. We all came in here knowing what we were  
12 supposed to do, what time limits we had, and it seems to me  
13 more appropriate to simply adhere to those time limits and  
14 press on. Mr. Rudolph can't be here tomorrow, he's off of a  
15 trial to be here today. If the Court was available tomorrow,  
16 I can make accommodations and be here tomorrow, but I would be  
17 without Mr. Rudolph, who has to resume his trial that he's  
18 taken a day off. So I think the options are we either adhere  
19 to the time limits, or we try to reschedule tomorrow, or we do  
20 as Mr. Packin suggested and try to get another day, and I  
21 think that's the -- from my standpoint, that's the least --

22           THE COURT: How about Dr. Kalsher? What's his  
23 availability for tomorrow?

24           MR. KALSHER: I can see if I can get out of things  
25 that I have to do at the University and child care. I hadn't

1 planned on this, I concede.

2 THE COURT: Let's take a 45 minute lunch recess.

3 MR. PACKIN: If I may just --

4 THE COURT: Is 45 minutes enough?

5 MR. PACKIN: It is for me. If I may just give some  
6 brief response. I mean, originally these were --

7 THE COURT: I really think we're -- this becomes a  
8 scheduling problem. I'm sorry for the expense and all that,  
9 but I just don't want to spend our time discussing scheduling  
10 on the record, if we can help it. So if you'll work with your  
11 witness, see if you can show up tomorrow morning. Let's see  
12 whether that's an option.

13 MR. PACKIN: All right.

14 THE COURT: And that we would work through and get  
15 some work done in the afternoon today. And Mr. Rudolph, we'd  
16 have to --

17 MR. RUDOLPH: I'll make calls --

18 THE COURT: -- carry on.

19 MR. RUDOLPH: I'll make calls over the lunch break  
20 as well.

21 THE COURT: All right. And it would start early,  
22 first thing tomorrow morning, 9 o'clock. And we'd go today  
23 until 5 or 5:30, you know, whatever you can endure. And you  
24 can take a shorter lunch break if you want.

25 MR. WALSH: I don't know that much about Trenton and

1 where I can go other than the basement --

2 THE COURT: Off the record.

3 (Court in recess)

4 THE COURT: As far as our time clock is concerned  
5 and where we proceed from there, do we have suggestions?

6 MR. PACKIN: It appears from the discussions I've  
7 had with counsel and Dr. Kalsher that we could all return  
8 tomorrow morning and complete this, as long as it's  
9 satisfactory with the Court, in which case, for the benefit of  
10 all, I would -- because I guess I'm going to end somewhere  
11 close to 4, based on our timing. And maybe we stop at that  
12 point since tomorrow's going to provide ample time for them to  
13 do what they need to do?

14 THE COURT: So you would think to finish your direct  
15 examination of Dr. Kalsher and then we'd adjourn for the day.

16 MR. PACKIN: Right.

17 THE COURT: How's that?

18 MR. WALSH: That's fine, Your Honor. And I think  
19 even Mr. Rudolph has managed to finagle another day, so.

20 MR. PACKIN: I might need time to get Dr. Kalsher  
21 another shirt for tomorrow, I'm told, but other than that --

22 MR. WALSH: There's no rule against wearing --

23 THE COURT: We have some downstairs actually.

24 MR. WALSH: I hope there's no rule --

25 MR. PACKIN: Shirts?

1           MR. WALSH: -- against wearing the same suit two  
2 days in a row.

3           MR. PACKIN: The shirts aren't orange are they with  
4 large letters on the back?

5           (Laughter)

6           MR. PACKIN: One other -- just so it's clear, I  
7 mean, I have -- in reliance obviously on Your Honor's  
8 indication that you have read the reports and the CV and the  
9 depositions, I have not gone into every single sentence of  
10 every single paragraph, in fairness to everyone here. Not  
11 that I'm waiving that, it's there, it's in the materials, and  
12 it's discussed in our moving papers.

13          THE COURT: That's fine. This is a Daubert Hearing,  
14 this is not a 14-hour deposition, nor is the full dress  
15 trial --

16          MR. PACKIN: Thank you.

17          THE COURT: -- on the merits, when as and if we get  
18 to that. It's a Daubert Hearing. And the fact that you had  
19 the report here verified by Dr. Kalsher and that you are  
20 taking him through some of the testimony that highlights what  
21 he has to say there and why, I think that's sufficient for a  
22 hearing, and you're not being foreclosed from further inquiry  
23 if you should find you need it.

24          MR. PACKIN: Thank you.

25          THE COURT: Now, Mr. Walsh, you will have the

1 opportunity to take over the floor tomorrow morning at -- what  
2 hour would you like?

3 MR. RUDOLPH: 9 o'clock is --

4 MR. WALSH: 9 o'clock, whatever suits the Court  
5 but --

6 THE COURT: 9 o'clock is fine.

7 MR. WALSH: -- be we can be available by 9 o'clock  
8 certainly.

9 MR. PACKIN: If it doesn't inconvenience everyone, I  
10 don't -- (indiscern.).

11 UNIDENTIFIED SPEAKER: No.

12 MR. PACKIN: Because I have about an hour, hour and  
13 a half drive total to get here.

14 THE COURT: Okay, let's start promptly at 9:30.

15 MR. PACKIN: That would be great, thank you.

16 THE COURT: On Defendant's side of the case.

17 MR. PACKIN: Correct.

18 THE COURT: And we'll do equal time for them  
19 tomorrow and any redirect that you need. And then we'll talk  
20 about how you get to present your closing arguments and when.  
21 But let's just get the testimony in tomorrow. Okay?

22 MR. PACKIN: Thank you.

23 THE COURT: And you do have a little bit of leeway  
24 this afternoon since we're not on a breakneck --

25 MR. PACKIN: Thank you.

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1 THE COURT: -- pace. Thank you one and all.

2 MR. PACKIN: Thank you, Your Honor.

3 DIRECT EXAMINATION (CONT'D)

4 BY MR. PACKIN:

5 Q. Where we had left off was on page 6 of your report, where  
6 you had indicated that even if the yellow label that was  
7 missing had been present, it was defective in format and  
8 content, to use your words, correct?

9 A. Yes.

10 Q. Okay. Now, why, first of all, did you address the issue  
11 of its format and content if, in fact, it was not on the  
12 machine at the precise time of the accident?

13 THE COURT: That label we're talking about?

14 MR. PACKIN: Yes, Ma'am. The one that is --

15 THE COURT: The yellow one.

16 MR. PACKIN: Yes. I will remove the other.

17 THE COURT: The reason I ask the question, Counsel,  
18 is that the exact quote from the opinion letter on page 6, the  
19 last sentence of the first full paragraph, {quote} "However,  
20 even if the yellow sticker had been present, the labeling  
21 still would have been defective." So I think you should ask a  
22 foundation question. We're talking about a yellow label or  
23 something more.

24 BY MR. PACKIN:

25 Q. And in you were stating in that line of your report that

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1 the labeling still would have been defective, is one of the  
2 elements of the labeling you're addressing the missing yellow  
3 label, which we have blown up there as P-6?

4 A. Yes.

5 (Plaintiff's Exhibit-6 previously marked for  
6 identification)

7 Q. And why did you address that if it, in fact, wasn't  
8 present at the time of the actual accident?

9 A. Because based on my reading of the materials and the  
10 testimony in this case, it was clear there wasn't just one saw  
11 that was purchased and used by Jingoli put to use, but there  
12 were many. It also was the case that since the label could  
13 have been on a machine at a point in time that Mr. McGee or  
14 his co-workers were working with it, it's possible that it  
15 would have been on while he or others were using it.

16 Q. Okay. And what criteria did you use? In other words, what  
17 criteria did you use when reaching the conclusion that the  
18 label, P-6, was defective in format and content? And I'm not  
19 asking you at this moment, we'll get into it, for the specific  
20 deficiencies, but what did you measure it against?

21 A. I measured the format and content of this warning against  
22 two primary things: One was the ANSI standard in terms of its  
23 recommendations for how one would design the format and  
24 content of a warning; and also from my understanding of the  
25 literature, the warning's literature and what it would

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1 indicated needed to be on the sign in terms of its content and  
2 format.

3 Q. Okay.

4 THE COURT: So you're referring to ANSI Z535?

5 A. Yes.

6 THE COURT: And the literature --

7 A. Yes.

8 THE COURT: -- in the field. Okay, thank you.

9 BY MR. PACKIN:

10 Q. Now, looking at page 6 of your report, it appears to be  
11 the bottom third of the page where you begin to specify the  
12 enumerated deficiencies in form and content of the label  
13 that's on the easel in front of you, correct, sir?

14 A. Yes.

15 Q. Okay. Let's talk about the first one please. You state  
16 that the organization of the information is likely to lead  
17 users to believe the purpose of the label is to convey  
18 technical information. And I would ask you on what do you  
19 base that opinion, and how does that relate to a deficiency in  
20 that form and content of that label.

21 A. Yes. On that part, we're looking, focusing on the left  
22 side of the label where you're indicating that. When we talk  
23 about the design of warnings, they're in response to --  
24 {cough} excuse me -- one or more hazards to point out what the  
25 hazards are, their severity and likely consequences, and

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1 avoidance information that would be relevant to that. Having  
2 that as a basis, then what you see following the signal word  
3 warning and the admonition, general admonition to read and  
4 follow the safety precautions in the owner's manual is a  
5 presentation of the maximum spindle speed, which is  
6 highlighted in red font, 5,350 RPM. But for a warning, one  
7 would expect there to be more information to tell a user why  
8 that's important information in the context of a warning; that  
9 is, what is the hazard, what are the likely consequences of  
10 not maintaining -- of somehow violating the maximum spindle  
11 speed as it relates to the information that comes in the  
12 subsequent number, such as "Use only wheels marked with  
13 maximum operating speed equal to or greater than the spindle  
14 speed of this machine," what the maximum wheel diameter is  
15 and .4 -- well, we'll get to that in a minute, but what that  
16 tells me is there's -- they're giving technical information  
17 without any what I would call warnings information that would  
18 point out the specific hazard and the consequences.

19 Q. Okay. In those first three items that you just read,  
20 items 1, 2 and 3, do any of them -- did any of them indicate  
21 to you what, if any, danger was associated with any one of  
22 those three?

23 A. Well, on the face if it, if I were just to look at that  
24 sign, it wouldn't give me any indication of that. Of course,  
25 since I've read a lot of information in this case, I know the

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1 rest of the story from having read the manual and read the  
2 testimony and so on.

3 Q. All right. What you've indicated here, would it be fair  
4 to say that's approaching it as one would as a first time  
5 reader of it, without that information?

6 A. Yes.

7 Q. Okay. Item 3, for example, does that -- when you read  
8 that, did that appear to you to be in any way a warning or  
9 danger alert giving the maximum wheel diameter, nominal arbor  
10 hole and maximum wheel thickness?

11 A. No.

12 Q. What, as a interpreter -- as a expert in the field,  
13 rather, of warnings and safety communication did that indicate  
14 to you was being conveyed there?

15 A. Because it doesn't tell me what the specific hazard of  
16 that is. And I'll refer back to the precursor, which is the  
17 signal word in the general admonition to read and follow all  
18 safety precautions in the owner's manual, that other than  
19 that, plus there's a general, again, statement that improper  
20 use can cause serious and fatal injury, but there's not enough  
21 specific information to understand what the nature of the  
22 hazard is for that independent -- the specific information.

23 Q. From you standpoint as a warnings expert, what happens if,  
24 in a situation such as this, if a reader sees a signal word  
25 warning and begins to read and does not see information that

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1 appears to be addressed actually to warnings, what happens?

2 A. Well, it's likely that -- there are a couple of things  
3 that would happen. First of all, the signal word is written  
4 in a large and colored font, which is likely to attract a  
5 person's attention.

6 THE COURT: The what is?

7 A. The signal word "Warning."

8 THE COURT: Oh, the signal word, you used that term  
9 signal word.

10 A. The signal word "Warning" with the signal alert symbol  
11 after it is followed immediately by the general admonition to  
12 "Read and follow all safety precautions in the owner's manual  
13 - improper use can cause serious or fatal injury." Then  
14 there's a little bit of a space before the enumerated bulleted  
15 points from 1 through 12. So when you get to the next couple  
16 of points, talking about maximum spindle speed, use only  
17 wheels marked with, and then the rest of that, and the maximum  
18 wheel diameter, it's reasonable to assume that a person would  
19 see that first warning as a warning about general precautions  
20 and no specific precautions, and now we're moving on to more  
21 technical information about the saw itself.

22 Q. All right. Would that, in your opinion, in any way affect  
23 the person's likelihood of reading this label completely?

24 A. Yes, for a couple of reasons. One is if the person  
25 doesn't see that information as relevant to them or relevant

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1 to their personal safety, then they may be dissuaded for that  
2 reason from not finishing off. The basis for that is  
3 information in the literature that talks about the processes  
4 of processing information from the beginning when a warning or  
5 something in the environment is detected to switching that  
6 information to actually focusing on it so that one can read  
7 it, remember it and so on. It doesn't hold one's attention  
8 from that perspective. When you see that there's all of the  
9 rest of the information that's listed, delineated and numbered  
10 statements that are continuous in two columns, that unless  
11 there is something specific that you're looking for for  
12 yourself, you're likely to be dissuaded from doing that, and  
13 the basis from that is the generally accepted principle of  
14 cost of compliance. The general acceptance is that the cost  
15 of complying with the even reading a warning does not have to  
16 be that great before people are dissuaded from doing it.

17 THE COURT: What did you call that, dissuaded?

18 A. Dissuade.

19 THE COURT: Now, what's this concept?

20 A. Cost of compliance.

21 THE COURT: Dissuade reading to the end, right?

22 A. Yes.

23 THE COURT: Cost of compliance. In other words, I  
24 can't be bothered reading to the end because I'm busy. Is  
25 that what you mean by cost of compliance, or do you mean --

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1 A. Yes, there's always competing interests a person has in  
2 their busy day, and if a person does not perceive that there  
3 is an immediate hazard, they have used something like this  
4 cut-off saw for many times without experiencing any injury or  
5 any negative consequences -- there's another term that is used  
6 to refer to that, "benign experience" -- they'll be less  
7 likely to look for safety related information if they don't  
8 perceive that there is a risk to them in the immediate future.

9 THE COURT: Background of benign experience, okay.

10 BY MR. PACKIN:

11 Q. And focusing, Doctor, on your specific conclusion that  
12 this initial information on this label would be likely to lead  
13 users to believe the purpose is to convey technical  
14 information, we've talked about 1, 2 and 3; how about #4?

15 A. Again, this gets a little bit closer to the beginning of  
16 an instruction, which is "Always inspect the guard and flanges  
17 for damage after any wheel breakage on the machine," which is  
18 quite reasonable. The problem is, again, it doesn't tell the  
19 reader what the hazard is and the likely consequences of not  
20 following that directive.

21 Q. Does it tell the reader if there's any hazard?

22 A. No.

23 Q. How about #5?

24 A. That one states, "Use only composite wheels marked high  
25 speed, reinforced or diamond wheels that are approved for use

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1 on hand-held portable cutting-off machines and meets the  
2 requirements of ANSI B7.1.

3 A. Okay.

4 Q. Again, there's no hazard or consequences information  
5 stated for that. Also, it's not clear whether an end user  
6 would understand what the requirements of ANSI B7.1 are, nor  
7 would they be aware, as of the point in time that we're  
8 talking about for this accident, that ANSI B7.1 had actually  
9 been withdrawn by ANSI as a standard.

10 Q. How about #6?

11 A. #6, "Only Stihl branded wheels or other wheels approved by  
12 Stihl or authorized. Unauthorized wheels may break and cause  
13 serious personal injury." Now, this is reasonable because now  
14 it's in the format of what one could consider as an ANSI style  
15 kind of a warning because it states what the potential  
16 consequences are. But again, the problem here is that it's  
17 unlikely that a typical user would understand what the wheels  
18 were that were approved by Stihl that are authorized.

19 Q. And is it this type of material that your -- I'm sorry,  
20 was it these items on which you based the conclusion in the  
21 way you've just expressed?

22 A. Yes, in part.

23 Q. And what else contributed to the conclusion that the  
24 organization of information would likely lead the users to  
25 believe the purpose was to convey technical?

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1 A. Oh, I'm sorry, I thought I was answering another question

2 --

3 Q. Okay.

4 A. -- so I'm done.

5 Q. Now, you also state on page 6 in that same section of  
6 bulleted items that one of the deficiencies was unless users  
7 are replacing or adjusting the blade prior to use, they might  
8 not see the label. And we do have the exemplar that we marked  
9 on the table before you, so if you want to use that.

10 THE COURT: What's the topic, placement now?

11 MR. PACKIN: That unless users are replacing or  
12 adjusting the blade they are -- prior to use, they may not see  
13 the label.

14 BY MR. PACKIN:

15 Q. Explain why that was a deficiency in the format and  
16 content and how so, the basis for your conclusion.

17 A. Right. If you're not replacing the blade, and I found  
18 from my own experience when I rented it, when you're going to  
19 operate the saw, you're usually standing behind it. And you  
20 use the choke, you make sure that you're going to turn the  
21 switch on and you pull the chord to start it up, and you're  
22 ready to operate it like that. That's also consistent with  
23 another general concept in my field, which is the idea that  
24 people generate scripts for their behavior. So in this case,  
25 the script would be unless there's some reason to change the

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1 blade out, one wouldn't necessarily be in a position to see  
2 that label, particularly if you were going to inspect the  
3 wheel, which is a reasonable thing to expect people to do.  
4 The label isn't on both sides. So unless you were looking for  
5 that or if you looked on the other side, if you weren't  
6 looking for that or you looked on the other side, you wouldn't  
7 come into contact with that information. The script is if I'm  
8 not going to change the wheel, I'm going to merely check to  
9 make sure that there's no checks. The script says I'm going  
10 to start it and do my job. And so it's not in a position to  
11 interrupt that script, and there is research in the literature  
12 to suggest that there are ways to break that script, based on  
13 location and placement of a warning.

14 Q. All right, now --

15 THE COURT: Just so that we have something on the  
16 record about the location of whatever label you're talking  
17 about, I see on the prototype, the new one -- it's not a  
18 prototype, it's a real machine. You have a yellow label  
19 there, and it's on one side of the blade guard, right? Is  
20 that the location you're talking about?

21 A. Yes.

22 THE COURT: Okay, thank you.

23 BY MR. PACKIN:

24 Q. I was actually just going to cover a little bit of that on  
25 the record. Is it your understanding that the operator would

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1 operate the machine as I'm generally holding it, from standing  
2 behind it and having the machine off to one side?

3 A. Yes, that last point was very important that you added.

4 Q. Okay. Now, the label, the warning label that we're  
5 talking about, as the Court has pointed out, is on one side of  
6 the blade cover, correct?

7 A. Yes.

8 Q. Which side of the tool is it your understanding is the  
9 side from which the blades or wheels would generally be  
10 replaced?

11 A. It would be from the other side.

12 Q. From the opposite side or from this side?

13 A. Bring it up and maybe I -- may I point to it? yes, see,  
14 you'd actually take this off, unscrew that to take it off.

15 Q. Okay. Just for the record, he was pointing to the nut or  
16 bolt that's on the same side as the label. So that's what  
17 you're talking about, then, about the user looking at it or  
18 having it in the line of sight if changing --

19 A. Yes, if they were changing the blade, it's more likely  
20 that they're changing the blade that they could come into it.  
21 But if they weren't changing the blade, they were merely going  
22 to operate it, it's less likely they would come into contact  
23 with the sticker.

24 Q. All right, so when it's being held by the user as I'm  
25 holding it now, what is the orientation of the user vis-a-vis

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1 the label?

2 A. You're above and behind it and on the other side.

3 MR. WALSH: Your Honor, I'm going to object to this  
4 whole line of questions. Mr. Packin either intentionally or  
5 inadvertently is holding the machine left-handed --

6 MR. PACKIN: Because I'm left --

7 MR. WALSH: -- which is not the way the machine is  
8 held in use, and there are specific instructions and warnings  
9 in the manual and otherwise not to hold it in that direction.  
10 It is held and used in the position he now has it.

11 BY MR. PACKIN:

12 Q. All right, so since I'm left-handed, and that's why I  
13 picked it up as a lefty. Now I'm holding it right-handed.  
14 Does that change any of the orientation?

15 A. No, Mr. Packin is quite correct that it clearly says in  
16 the owner's manual that you operate with your right hand, but  
17 it doesn't change it because still you're above and behind.  
18 And we'll probably get to this point as we go along, but a lot  
19 of these points are interactive. One of the points that what  
20 you just said is relevant to is the size of the font that the  
21 information is printed on. One of the problems with  
22 presenting displays like this in this context is while we all  
23 want to be able to see what's on it, it may give a false sense  
24 of how big it is as opposed to the actual label, where the  
25 print size is about an 8 point font. And so from that

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1 distance away, it's unlikely that people would be able to read  
2 what's on it, other than perhaps notice that there's a yellow  
3 sticker there.

4 Q. Okay --

5 THE COURT: Just a second. 8 point font, does that  
6 refer to, not by name, but with the next bullet point, or is  
7 it just a related item? The next bullet point is that the  
8 yellow sticker is text heavy.

9 A. That's a slightly different point.

10 THE COURT: Okay, thank you. 8 point font is hard  
11 to read from you're standing, right? From where the user is  
12 standing holding the machine.

13 A. Yes, the guidelines in the ANSI Z535.4 standard suggest  
14 that for favorable reading conditions that the font size  
15 should be a minimum of an 8 point font when the safe viewing  
16 distance is a foot. It goes up to an 8.5 or 8.4 font size for  
17 unfavorable viewing conditions at that level. And then if you  
18 were to go up to two feet and so on, it would increase the  
19 recommended size for the font.

20 Q. Does ANSI Z535 suggest that or state that?

21 A. It states that.

22 Q. Now, the next point is that the label is too text heavy,  
23 with the subject warning, being the one about wood cutting  
24 blades, located in the second column, more than 20 lines into  
25 the text where it is not likely to be noticed or appreciated

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1 as being an important safety warning in such context. On what  
2 did you base that, both factually and in terms of the warnings  
3 and safety communication science?

4 A. Well, a couple of reasons. In the ANSI standard, it does  
5 permit that you warn about multiple hazards on the same label,  
6 but give some directions for how one should do that. If you  
7 use multiple warnings, it suggests that there should be some  
8 organization to that, with the most significant hazards or  
9 dangers presented first.

10 Q. Suggests or states?

11 A. States.

12 THE COURT: Is this ANSI and the literature?

13 A. This is the ANSI standard.

14 THE COURT: Is to organize with highest priority,  
15 right?

16 A. Highest priority as it relates to, yes, the severity of  
17 the hazard.

18 THE COURT: And what else?

19 A. I didn't say anything else.

20 THE COURT: Okay.

21 A. I'm sorry, I might have lost my train of thought.

22 BY MR. PACKIN:

23 Q. Now, what in the materials that you reviewed led you to  
24 conclude that -- and what you're talking about is item #8,  
25 correct --

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1 A. Yes.

2 Q. -- on the label. And for the record, that's -- the  
3 label's oriented in two columns of text, approximately 20  
4 lines per column?

5 A. That's my understanding, yes.

6 Q. And that was reflected by your review and looking at the  
7 format --

8 A. Yes.

9 Q. -- of the label? And item #8, the one we're dealing with,  
10 is in the second column, correct?

11 A. Yes.

12 Q. So more than 20 lines in?

13 A. Yes.

14 Q. Now, what, if anything, led you to conclude that the  
15 subject warning of item #8 had a hazard level such that it  
16 should not have been located at that point in the text of the  
17 label?

18 A. Well, we should probably read through this so we'll get to  
19 that point. It states, "Use only abrasive wheels, including  
20 abrasive diamond wheels. This machine is not a circular saw.  
21 It is not equipped with the guarding appropriate for a  
22 circular saw and is not designed to cut wood. And if you use  
23 carbide tip wood cutting or other metal blades, they can cause  
24 severe or fatal personal injury from reactive forces of blade  
25 contact or thrown tips." As it relates to my earlier point,

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1 which is ANSI's statement to put priority to the highest level  
2 of severity in terms of the hazards, that indicates that, from  
3 my reading of that warning, that's the only one on there that  
4 specifically says the consequence is severe or fatal personal  
5 injury.

6 Q. And was there anything else in the materials that you  
7 reviewed in this case that led you to conclude that this  
8 particular hazard had a high hazard level or a high priority  
9 level?

10 A. Well, certainly we visited that earlier when we were  
11 talking about Mr. Linsbauer and Mr. Elsner, who testified that  
12 they understood that this was a common misuse, using carbide  
13 tipped or wood cutting blades on it, that they knew it was  
14 dangerous and it was a common misuse.

15 Q. You mentioned earlier today about the website materials.  
16 Did that inform you in any way?

17 A. Well, yes, we talked about that earlier, but maybe it's  
18 good to mention that here, which is at the website, Stihl's  
19 website, the section that deals with cut-off saws, this is the  
20 only warning, the hazard warning, that is present on every  
21 page at the Stihl website.

22 Q. What, if anything, did you conclude from that that was  
23 pertinent to the conclusion that this warning was not located  
24 in the appropriate position on this label?

25 A. Well, one, we've said that this is the only specific

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1 hazard that has that level of consequence associated with it,  
2 I talked about the testimony of Mr. Elsner and Linsbauer, and  
3 -- could you say that -- somehow I just lost my train of  
4 thought and I apologize for that.

5 Q. Yes, what about the fact that -- what about what you just  
6 testified to, seeing this as the only specific hazard warned  
7 of on every section of the website, led you to conclude that  
8 that had a bearing on the hazard level of this particular  
9 issue, in addition to what you've already told us?

10 A. Right. That also is corroborated by at least these two  
11 cases in terms of the severity of the injury that occurred in  
12 the Stout case and in the McGee case.

13 Q. Now, further on in those bulleted points you say the  
14 subject warning is presented as #8 in the 12 items of text,  
15 despite the fact that the consequences of using such a blade  
16 arguably poses one of the most immediate warnings and severe -  
17 - one of the most immediate and severe hazards. How does  
18 that, if at all, expand upon what we've just discussed?

19 A. Could you tell me where you're at? Somehow --

20 Q. Yes.

21 A. -- I'm not with you now.

22 Q. We may have run over onto page 7 --

23 THE COURT: We're on page 6, the last bullet.

24 BY MR. PACKIN:

25 Q. Actually, we're on the top of page 7, sorry.

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1 THE COURT: Okay. What were you reading from them?

2 MR. PACKIN: The very first lines.

3 THE COURT: Read it please.

4 BY MR. PACKIN:

5 Q. "The information relevant to the hazards of using carbide  
6 tipped, wood cutting blades is presented as statement #8,  
7 despite the fact that the consequences of using such a blade  
8 on Stihl's cut-off saws arguably poses one of the most  
9 immediate and severe hazards to users. This is supported by  
10 the fact that this hazard is present on every Stihl webpage  
11 that deals with cut-off saws." Is the numbering of it as item  
12 #8 in the list of 12 a factor in any way additional to what we  
13 were just talking about, about it being in the second column  
14 after 20 lines of text?

15 A. Yes, if it's the only hazard that's singled out with that  
16 level of consequence, it arguably should have been towards the  
17 front, one of the first items mentioned in the sequence. Or,  
18 as I've indicated in previous depositions, it could be  
19 separated out to highlight that information and separate it  
20 from the other text. In fact, I had developed some candidate  
21 warnings that did just that.

22 Q. Okay. You indicate on page 7 that there -- one of the  
23 deficiencies in the format and content of this label is that  
24 there's nothing to draw the user's attention to item #8 of the  
25 label, it is in the same font size and font type as all other

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1 information on the label, therefore lacking necessary  
2 conspicuity to attract the user's attention. On what did you  
3 base that opinion, both factually and in the field of warning  
4 science?

5 A. Yes, as it relates to the ANSI Z535 Standard, information  
6 that you wish to be set out needs to use conspicuity enhancing  
7 features, such as size, color, location and so on to make it  
8 stand out from the background.

9 Q. Okay. And were you then measuring the adequacy or lack  
10 thereof of this warning against that standard?

11 A. Yes.

12 Q. Is that supported anywhere in the warnings literature,  
13 aside from ANSI?

14 A. Yes, there is a significant body of literature that  
15 suggests that some of the measures of warning effectiveness,  
16 and again, there are several levels of that from noticing to  
17 reading to recalling and compliance, that suggests that  
18 conspicuity enhancing features can be very effective at  
19 increasing the effectiveness of a warning.

20 Q. Okay, when you say suggests, you're leaving me a little  
21 bit vague about it. Does it state that or does it suggest  
22 that?

23 A. The conclusions of research indicate or state -- maybe  
24 it's just a layperson's language being in a legal environment.  
25 The research supports that the use of these conspicuity

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1 enhancing features can have a significant impact on warnings -  
2 - measures of warnings effectiveness.

3 Q. And what type of conspicuity features should have been  
4 used with this warning, this particular one, #8, in terms of  
5 format and content -- format and placement?

6 A. Well, one thing is it could have been placed -- it should  
7 have been placed either at the head of the column or very near  
8 the head of the column. It could have been placed separately.  
9 It should have been highlighted with a pictograph, such as the  
10 one that's included in Stihl's owner guide that has the  
11 prohibition symbol around a toothed saw image. It could have  
12 been highlighted by candidate warnings and pictographs that  
13 I've developed for this case, including the pictograph that  
14 indicates a cut-off saw coming up towards person, ostensibly  
15 to hit them in the face.

16 Q. All right. You indicate along those same lines on page 7,  
17 "Stihl should have included a comprehension tested version of  
18 the prohibited toothed blade pictogram" --

19 THE COURT: You're going to fast.

20 MR. PACKIN: I'm sorry.

21 THE COURT: Should have included a what?

22 BY MR. PACKIN:

23 Q. "Comprehension tested version of the prohibited toothed  
24 blade pictogram contained in the Stihl owner's manual or a  
25 similar symbol to increase the likelihood that users would

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1 notice and comprehend the intended message." You've mentioned  
2 to us before that you saw in the owner's manual such a  
3 pictogram used by Stihl in connection with a verbal warning  
4 about -- a written warning, I should say, about this hazard,  
5 correct?

6 A. Yes.

7 MR. PACKIN: I'm going to ask to mark a blowup of  
8 that as the next exhibit, which I think is P-8.

9 (Pause in proceedings)

10 MR. PACKIN: Shall I proceed even though we don't  
11 have someone here to mark it at the moment?

12 THE COURT: Yes, please. You can just put it in  
13 pencil, P-8. Any objection to this item?

14 MR. RUDOLPH: What is it, Barry?

15 MR. WALSH: Can I see it, please, quickly, in the  
16 manual? That's fine, no objection.

17 THE COURT: Okay. We already have a P-8.

18 MR. PACKIN: P-9 then. Should I just write on it in  
19 ink, or --

20 THE COURT: In pencil.

21 MR. PACKIN: Pencil? I don't have a pencil.

22 THE COURT: Mr. Walsh, no objection?

23 MR. WALSH: No objection, Your Honor.

24 THE COURT: Thank you, Counsel, P-9 in evidence.

25 (Plaintiff's Exhibit-9 marked for identification)

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1 (Plaintiff's Exhibit-9 admitted into evidence)

2 MR. WALSH: Your Honor, while we're marking that, I  
3 would make a request that I assume that all of these exhibits  
4 will be here tomorrow for use also, correct?

5 UNIDENTIFIED SPEAKER: (Indiscern.).

6 BY MR. PACKIN:

7 Q. Looking at P-9, is that an enlargement of the page of the  
8 TS 400 owner's manual that you were referring to?

9 A. Yes.

10 Q. Now, looking at that, on the top right of the page is  
11 where Stihl has a textual warning about use of the carbide  
12 tipped toothed saw blades, correct?

13 A. Yes.

14 Q. Generally speaking, similar to the one that's on the label  
15 as item #8, correct?

16 A. Yes.

17 Q. Now, in this exhibit, there is a pictorial that's used,  
18 correct?

19 A. Yes.

20 Q. When you reviewed this matter -- when you rendered the  
21 opinion that they should have used a pictorial to enhance the  
22 likelihood that this warning would be noticed and understood,  
23 a pictorial you say such as in the manual, is this the  
24 pictorial you were referring to?

25 A. Yes.

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1 Q. When you --

2 THE COURT: Just a second, Counsel, there are two  
3 pictorials on that page, as well as couple of warning  
4 triangles, so which one are you referring to?

5 MR. PACKIN: I was about to get to that, about to  
6 get to that.

7 BY MR. PACKIN:

8 Q. This one in the uppermost right, is that the one you're  
9 referring to?

10 A. Yes.

11 Q. And what did that pictorial represent to you?

12 A. Represented the prohibition of using a toothed blade.

13 Q. Okay. And to the left, in the center of the page, there's  
14 another prohibition pictorial, correct?

15 A. Yes.

16 Q. What did that represent to you?

17 A. It's a prohibition of using a cracked or damaged blade.

18 Q. All right. By the way, the one in the center, the  
19 prohibition symbol against using a cracked or damaged blade,  
20 was that used by Stihl on the saw?

21 A. Yes.

22 Q. Okay. There was a string of pictographs -- pictograms on  
23 the side of the saw, correct?

24 A. Yes.

25 Q. And looking at P-8, do you see that same pictogram there?

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1 A. Yes, it's the second one from the right.

2 Q. So the cracked blade pictogram from page 6 was used on the  
3 machine?

4 A. Yes.

5 Q. And was it used on the McGee machine as well?

6 A. Yes.

7 Q. Is the toothed blade prohibition pictorial used on the  
8 McGee saw?

9 A. No.

10 Q. On this one here that we have in Court?

11 A. No.

12 Q. Were you able to reach any conclusion or basis that would  
13 support Stihl using the cracked blade pictogram on the saw but  
14 not using the saw blade pictogram?

15 A. No.

16 Q. Did Stihl's failure to use the toothed blade pictogram,  
17 yet use of the cracked blade pictogram, factor in in any way  
18 to your conclusions or reasoning in the case or indicate  
19 anything to you about that?

20 A. Yes, it appeared that they should have used the candidate  
21 -- or the prohibited toothed saw on -- they should have used  
22 that on the saw, in addition to the cracked symbol, and they  
23 did not.

24 Q. Okay. How would use of the toothed blade prohibition  
25 pictogram in connection with the different placement of item

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1 #8 and the use of different color and size, how would those  
2 altogether have, in your opinion, affected the conspicuity and  
3 the likelihood that this would be noticed and understood?

4 A. Well, the combination of pictogram and other enhancement  
5 features, such as color, highlighting, location, would have  
6 increased its conspicuity characteristics and made it more  
7 likely that somebody would notice it.

8 Q. Okay. Now, from the materials you reviewed in this case  
9 in terms of the factual underpinnings of that opinion, from  
10 the materials you reviewed in this case, did any of the  
11 workers in the McGee case testify that they had ever noticed  
12 that toothed saw blade warning on this label?

13 A. No.

14 Q. Did any of them --

15 THE COURT: Just a second, Counsel. Oh, you're  
16 talking about the text? The carbide tipped blades, is that  
17 what you're asking about?

18 MR. PACKIN: The only reason I'm pausing is I'm away  
19 from the mic.

20 BY MR. PACKIN:

21 Q. In terms of P-7, the label that is on the blade cover, in  
22 the testimony of the workers who used this machine in the  
23 Stout -- in the McGee case, did any of them acknowledge having  
24 ever noticed item #8 on that label?

25 A. Mr. McGee did testify that he noticed some of the

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1 pictograms on the machine.

2 Q. No, no, I'm talking just about this label --

3 A. Okay.

4 Q. -- the yellow label. Did any of the workers in this case  
5 ever testify that they had ever noticed the admonition in item  
6 #8 on the label?

7 A. No.

8 Q. Okay. Did any of them testify that they were aware that  
9 there was a prohibition against using toothed blades or a risk  
10 or danger associated with that?

11 A. No.

12 Q. How about in Stout, did any of them testify to being aware  
13 of the presence of that #8 in the second column of that label?

14 A. Prior to the accident?

15 Q. Yes.

16 A. No.

17 Q. Did any of them testify to an awareness that toothed  
18 blades were prohibited from use on this saw and created a  
19 danger?

20 A. No.

21 Q. Did that testimony from those various users of the saw  
22 have any bearing on your conclusions in this case?

23 A. Yes, because it corroborates what I had found from my own  
24 evaluation of the materials.

25 Q. Okay. Now, did you use their testimony to conclude that

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1 there were defects in the warning system or just to  
2 corroborate it?

3 A. To corroborate, because my testing was as it was, but it  
4 provided a reliability check.

5 Q. Okay.

6 THE COURT: You say testing, your own evaluation of  
7 these --

8 A. Materials.

9 BY MR. PACKIN:

10 Q. Okay, and as you stated at the outset of this section,  
11 they were measured by you against the body of literature and  
12 research, as well as ANSI Z535, correct?

13 A. Yes, I testified to that already.

14 Q. Okay. Now you mentioned in the paragraph we've just been  
15 discussing from your report that a comprehension tested  
16 version of the toothed blade prohibition symbol that's on page  
17 6 of the manual should have been used. Briefly stated, what  
18 does comprehension testing mean in your field, where is it  
19 contained? And in that regard I'll put one of the former  
20 exhibits up. And that exhibit is P-6.

21 (Plaintiff's Exhibit-6 previously marked for  
22 identification)

23 A. Are you asking about comprehension testing?

24 Q. Yes, just for the benefit of the Court --

25 A. Right --

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1 Q. -- what is comprehension testing and where, if anyplace,  
2 is it codified?

3 A. Comprehension testing is a procedure used to ascertain the  
4 level of comprehension of a pictogram or symbol to a  
5 representative set of people who might be exposed to it.  
6 There are at least a couple of different approaches to doing  
7 that comprehension testing, the most widely accepted is called  
8 Open Comprehension Testing in which to provide a context in  
9 which the symbols would be found to the users that you will be  
10 testing, then ask them to tell you what they think it means.  
11 The ideal or goal of which is to determine whether it meets  
12 the established criteria for passing, meaning in terms of  
13 comprehension of 85% correct comprehension, with fewer than 5%  
14 critical confusions, which means opposite meanings or meanings  
15 that could lead to somebody being injured.

16 Q. Okay. And where, if anywhere, is that 85% comprehension  
17 with less than 5% -- no more than 5% critical confusions  
18 embodied?

19 A. It's in an annex of the ANSI Z535.3 standard.

20 Q. Okay. And where is that drawn from?

21 A. Where is which drawn from?

22 Q. Where did ANSI come up with that?

23 A. Well, the reasoning is that in order to use a pictograph  
24 or a symbol alone, you want to ensure that it's going to --

25 THE COURT: Or a symbol.

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1 A. Or a symbol to be appropriately understood by the people  
2 to whom you're going to expose it so that they'll understand  
3 it.

4 BY MR. PACKIN:

5 Q. All right, if I understood correctly from what you just  
6 said, then that testing applies for pictorials that are used  
7 as standalones, is that correct?

8 A. That's correct.

9 Q. When they're used in conjunction with text, in other  
10 words, you've indicated in this particular part of your report  
11 that they should have augmented the textual portion of the  
12 label that was on the machine with a pictogram, correct?

13 A. Yes.

14 Q. When they do that, would it actually have to be tested if  
15 it's partnered with text, as it was in the manual?

16 A. No, there's no requirement. ANSI allows you to supplement  
17 textual information with pictograms that have not been tested  
18 or have not been -- have not passed the 85% comprehension  
19 criteria.

20 Q. Was there any reason based in warnings, risk communication  
21 or logic that you could find for Stihl having used this  
22 pictogram of the saw blade with the prohibition symbol in the  
23 manual with the text, but not on the saw with the text?

24 A. No.

25 Q. And was that one of the elements that you were speaking of

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1 when you identified the defects in form and content of this  
2 label?

3 A. Yes.

4 Q. You indicated on page 7 that expected users -- one of the  
5 deficiencies in form and content was that expected users may  
6 not understand the term {quote} "reactive forces" {close  
7 quote} as opposed to kickback, and there you're referring to  
8 words used in warning #8, correct?

9 A. Yes.

10 Q. And what did you mean, what was the basis for your opinion  
11 that expected users might not understand reactive forces  
12 versus kickback?

13 A. Based on my review of the materials in this case,  
14 including material presented in the owner's manual and so on,  
15 indicates that -- if I can have a drink. I'm having a hard  
16 time --

17 THE COURT: Reactive forces.

18 A. -- for some reason -- reactive forces.

19 BY MR. PACKIN:

20 Q. Versus kickback.

21 A. Right. Indicates that reactive forces is kind of a  
22 general term, and it really is not synonymous with what  
23 actually happened in this case, which is the saw kicked back,  
24 and so therefore is not likely to be understood by the type of  
25 end users that would use this saw.

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1 Q. In the --

2 THE COURT: But you have literature?

3 MR. PACKIN: That was going to be my next question.

4 THE COURT: Okay, go ahead.

5 BY MR. PACKIN:

6 Q. In the materials that you reviewed, did you see -- for  
7 example, the depositions of the various users, did you see how  
8 they described this type of event that caused Mr. McGee's  
9 injury, what term they used to describe it?

10 A. Well, in the deposition testimonies, they typically would  
11 refer to this as kickback.

12 Q. Okay.

13 A. Or that it jumped out, something like that. But I never  
14 heard the term "reactive forces" used by any of the end users.

15 Q. You also indicate that the label was defective in that it  
16 lacks information regarding position of the cutoff saw blade  
17 vis-a-vis the material being cut as it relates to the  
18 direction of kickback. Would you explain to us the basis for  
19 that conclusion?

20 A. Yes. Again from my reading of the materials in this case,  
21 it's my understanding that the direction that the saw will  
22 move depends on the position of the saw blade with respect to  
23 the material that's being cut. If it's being cut on the upper  
24 part of the blade, then the kickback will go back toward the  
25 person. If the material being cut is being cut with the

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1 bottom of the saw blade, it's more likely to be pulled away  
2 from the operator.

3 Q. These various deficiencies, defects, in the warning label  
4 that was intended to be on the guard but missing at the time  
5 of the accident, were all of those enumerated items based upon  
6 the warnings science that you've told the Court about earlier  
7 today, as well, as we have indicated, principles embodied in  
8 ANSI Z535?

9 A. Yes.

10 Q. Were each of those deficiencies ones that were  
11 substantiated by the case materials you had to evaluate,  
12 whether it be depositions, photographs, the owner's manual or  
13 the actual on-product labeling of the saw itself?

14 A. Yes.

15 Q. When you reached the conclusion you told us about earlier  
16 that the deposition testimony of these various users in McGee  
17 and Stout was corroborative of your conclusions, did you reach  
18 any opinion -- strike that. You state in your report that you  
19 concluded that they were a group of typical users, and their  
20 reporting that they did not recall ever having read that  
21 portion of the label was information you saw as from a group  
22 of typical users. Why did you conclude that this was a group  
23 of typical users?

24 A. Because Stihl itself --

25 MR. WALSH: I would object to the questions as

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1 completely muddled and at least leading.

2 MR. PACKIN: I'll rephrase it.

3 BY MR. PACKIN:

4 Q. You state in your report that the deposition testimony  
5 provided you with corroboration by a group of typical users,  
6 correct?

7 THE COURT: Where is that please?

8 MR. PACKIN: This is on page 7, Your Honor.

9 BY MR. PACKIN:

10 Q. That would be in the -- I have to switch glasses, I'm  
11 sorry.

12 THE COURT: Yes, the fact that Mr. McGee and his co-  
13 workers --

14 MR. PACKIN: Right.

15 THE COURT: This is sort of two-thirds of the way  
16 down in the first block paragraph.

17 MR. PACKIN: Yes, Ma'am.

18 THE COURT: Could not recall the sticker, et cetera,  
19 is corroborated by a group of typical users. Okay, so who's  
20 that group?

21 MR. PACKIN: These are the deponents, the various  
22 deponents --

23 THE COURT: Ask him.

24 MR. PACKIN: Oh, I'm sorry.

25 BY MR. PACKIN:

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1 Q. Who were these people that you're referring to?

2 A. The people I'm referring to are Mr. McGee and his co-  
3 workers that actually used the saw.

4 Q. How about in the Stout case, were you --

5 A. In the Stout case --

6 Q. -- including those?

7 A. -- it was the same thing.

8 Q. Okay. And how did you conclude -- on what basis did you  
9 conclude that they were typical users?

10 A. Because they were working in the construction industry,  
11 which is commensurate with what Stihl suggests the primary  
12 users of their saw will be.

13 Q. From the deposition testimony of these typical users, as  
14 you've identified them, could you determine whether their  
15 exposure level to Stihl TS 400 cut-off saws was rare,  
16 significant, moderate, on some level of a continuum of that  
17 type?

18 A. From the deposition testimony, it was clear that they used  
19 them a lot.

20 Q. And as we stated before, none were ever aware or testified  
21 to any awareness of item #8 on that label or its content?

22 MR. WALSH: Objection, leading.

23 BY MR. PACKIN:

24 Q. Is that correct?

25 A. Yes.

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1 THE COURT: I'll permit it.

2 BY MR. PACKIN:

3 Q. On page 7, you reached or you offered the opinion that if  
4 the missing warning label had the proper format and content  
5 and included a pictograph, it is reasonably probable that Mr.  
6 McGee would have been aware of the danger from prior uses of  
7 this or other TS 440s?

8 THE COURT: What have you just quoted from?

9 MR. PACKIN: That would be --

10 THE COURT: What page?

11 MR. PACKIN: Page 7, the next to last bulleted  
12 point.

13 THE COURT: Okay.

14 A. What was the question?

15 BY MR. PACKIN:

16 Q. The question is on what did you base the opinion that you  
17 offered that had the proper format and content -- had the  
18 warning label that we've been talking about, the one on the  
19 blade cover, the one that was missing, had it had the proper  
20 format and content and included a pictograph, it is reasonably  
21 probable that Mr. McGee would have been aware of the danger  
22 from prior uses of this or other TS 400s, what did you base  
23 that conclusion on?

24 A. Right. The warnings literature indicates that conspicuity  
25 enhancing features will make it more likely that people will

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1 notice and read the materials, and we know that those kinds of  
2 -- those factors are also related to subsequent compliance to  
3 the directive.

4 Q. Okay. Now, you've told us that the item #8 on this label  
5 is in the second column, over 20 lines in, the same type font,  
6 same type size, same color as all the other text, correct?

7 A. Yes.

8 Q. And that some of the items of text, at least facially,  
9 appear to not be warnings but specifications information?

10 A. Yes.

11 Q. How many different -- when you add the components that  
12 you've suggested here, that you've advocated here, size,  
13 color, placement, pictogram, how many different conspicuity  
14 concepts have you added to what is not on this label?

15 A. Have I personally?

16 Q. In other words, you've talked about color, that's one --

17 A. Yes.

18 Q. -- correct? Size, that's two.

19 A. Yes.

20 Q. Placement, location?

21 A. Yes.

22 MR. WALSH: Objection, leading.

23 MR. PACKIN: We found this in the record.

24 THE COURT: It's summary. Color, what?

25 BY MR. PACKIN:

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1 Q. Size --

2 A. Color, size --

3 Q. -- color --

4 A. -- location --

5 Q. -- location.

6 A. Highlighting.

7 Q. And pictograms, correct?

8 A. Yes.

9 Q. Okay. So those are, by count, at least five conspicuity  
10 enhancing features, correct?

11 A. Yes.

12 Q. And is it based on that that you concluded that it would  
13 be more probable -- that it would be probable that he would  
14 have noticed that warning?

15 MR. WALSH: That is leading, Your Honor.

16 THE COURT: Yes.

17 BY MR. PACKIN:

18 Q. Were those factors considered by you in reaching the  
19 opinion that it was reasonably probable that he would have  
20 noticed it?

21 A. Yes, in part, and additional evidence comes from the fact  
22 that there's no evidence to suggest that he wasn't a safe  
23 worker, he was reasonably well educated, so he could  
24 understand them if they had been formatted correctly. So  
25 taken together, I think it's more likely than not that he

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1 would have gotten the information he needed to make a correct  
2 decision.

3 Q. Okay, and you next, on page 7, you state that  
4 notwithstanding its inadequacies, the absence of the label  
5 from the blade cover at the time of accident left Mr. McGee  
6 devoid of any specific warning of this danger at the time of  
7 the accident. Presumptively you based that on the fact that  
8 the record indicates it was missing, correct?

9 A. Yes.

10 Q. What, if any, is the significance in a warnings analysis  
11 of the fact that the label is missing at the time of an  
12 accident?

13 A. Because the person would have no information to guide  
14 their behavior in that particular situation. We've already  
15 talked about other factors. I've said repeatedly that we talk  
16 about warning systems. But we've already visited that this  
17 morning, that in this group of users, since they didn't  
18 purchase or maintain the machines, it's reasonable to expect  
19 that they won't necessarily have access to an owner's manual,  
20 so devoid of the on-product labeling, they're without any  
21 information to guide their safety decisions.

22 Q. Okay. You state on page 5 that the only -- just let me  
23 pause a moment for the Court.

24 THE COURT: Sir, you've used the concepts -- we  
25 haven't gone over them in the testimony today, but you've used

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1 the concepts of the process of informing, and then explaining,  
2 and then warning and then reminding, and you use it sort of in  
3 a sequence. What are those words?

4 A. Yes, the general goals of the warning are to inform people  
5 about hazards in their environment, to --

6 THE COURT: To inform, okay.

7 A. To inform people about hazards in their environment, to  
8 tell them about the likely consequences associated with those  
9 hazards and their severity, and to give them information on  
10 how to avoid being injured.

11 THE COURT: And then you used the term "remind."

12 A. Yes, and that's a final one, to remind people at a time  
13 when it's closest to when they might come into contact with  
14 the hazard.

15 THE COURT: Okay. I didn't mean to take words out  
16 of your mouth, but you've been referring to these concepts all  
17 along --

18 A. Yes.

19 THE COURT: -- I just wanted them in one place.

20 A. Yes.

21 BY MR. PACKIN:

22 Q. If somebody's read a warning label at one time, if they  
23 have, hypothetically speaking, why is the reminder function  
24 necessary?

25 A. Because as we talked about earlier today, life is

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1 sometimes busy. You may have read the material, you may have  
2 read the material in the owner's manual, but we tend to forget  
3 these things, so it might not be on your mind. We talked  
4 about scripts of behavior; if you're not going to change the  
5 blade and your script is I start up the machine and use it,  
6 you need something to remind you at that point in time that  
7 you need to take actions to protect yourself in that  
8 situation.

9 Q. Okay. You indicate on page 5 that the only on-product  
10 safety information on the saw at the time of the accident was  
11 the strip of seven pictograms and the general admonition to  
12 follow safety precautions in the owner's manual.

13 A. Yes.

14 Q. Okay. Now, the machine that we've marked as P-8 that's in  
15 front of you on the table has that strip of seven pictograms,  
16 correct?

17 A. Yes.

18 Q. As located on the side of the housing of the machine we  
19 have here in Court, is that the same location as the McGee  
20 machine, based on the McGee photographs?

21 A. Yes.

22 Q. In terms of the general admonition to read the owner's  
23 manual, is that the textual decal you see in the lower right  
24 on that side of the machine?

25 A. I'm sorry, could you -- I don't know what you -- oh, I

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1 thought you were talking about the strip of symbols, I'm  
2 sorry.

3 Q. (Indiscern.). Does that have any of that precaution, this  
4 little textual one on the (indiscern.) --

5 A. Yes, this one basically provides that the general  
6 admonition -- no, this says "Warning, for safe operation,  
7 follow all safety precautions in owner's manual," yes.

8 Q. Okay. So let's talk first about the pictograms, and then  
9 the general admonition. You state in your report on page 8  
10 that there are deficiencies in the format and content of that  
11 strip of seven pictographs. The first one you say is that a  
12 comprehension tested version of a pictograph warning against a  
13 use of saw blades such as in the manual should have been on  
14 the saw with these seven other pictographs.

15 THE COURT: Are we on page 8?

16 MR. PACKIN: Yes, Ma'am. It's the very first  
17 bulleted item. The second sentence.

18 THE COURT: "A comprehension tested version of this  
19 pictograph should have been included directly on the saw."

20 MR. PACKIN: Yes.

21 THE COURT: Oh, you're talking about the one  
22 pictograph that's in the manual that says don't used a toothed  
23 blade?

24 MR. PACKIN: Correct.

25 THE COURT: Right?

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1 BY MR. PACKIN:

2 Q. Dr. Kalsher, you're referring there, are you not, to the  
3 pictograph on the upper right of P-9, the reproduction of page  
4 6 in the manual?

5 A. Yes, sir.

6 Q. Okay.

7 THE COURT: Okay.

8 BY MR. PACKIN:

9 Q. And what you're stating there is that should have been  
10 included in that strip of pictographs, the seven pictographs  
11 that's on that side of the saw, correct?

12 A. Yes, and I also added that it should be also included, as  
13 I refer to in my report, and adjacent to a revised version of  
14 the text message on the label that we've talked about  
15 previously.

16 Q. That we just covered so I don't want to --

17 A. Okay.

18 Q. -- duplicate that. Now you're also indicating that it  
19 should be added to the strip of seven pictographs, correct?

20 A. Yes.

21 Q. Okay. Now, first of all, is there physical room on the  
22 machine to do that?

23 A. Yes.

24 Q. Why do you feel -- what was your basis for concluding that  
25 a pictograph for this hazard should be among the strip of

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1 seven that already existed on the machine?

2 A. Right, because of the testimony of Mr. Linsbauer and  
3 Elsner that the use of toothed blades is a common and  
4 dangerous use because of the information presented at Stihl's  
5 own website where the prohibition against the use of toothed  
6 saw blade is the only thing that's singled out on the website,  
7 because of the multiple warnings in the product manual itself,  
8 and because of the information contained in #8, although we've  
9 already talked about why I think the presentation of that is  
10 defective. It's reasonable because of the level of severity  
11 associated with this that it should have been given a danger  
12 priority just as high as some of the other things that are  
13 indicated by the use of pictographs on the side.

14 Q. Looking at those seven pictographs, going left to right,  
15 what do they depict?

16 A. The first one on the left is --

17 THE COURT: Six?

18 BY MR. PACKIN:

19 Q. Is it six or seven? Are there six or seven?

20 A. There are six here.

21 Q. I'm sorry, I misspoke. What is the first one, going from  
22 left to right?

23 A. I'm going from left to right. The first one on the left  
24 is a red triangle surrounding an exclamation point printed in  
25 black on a white format.

1 Q. Which means --

2 A. It's a --

3 Q. -- what?

4 A. It's a general symbol for alerting.

5 Q. Okay. What's the next one?

6 A. The next one is a depiction of an open book that I know  
7 the meaning, the intended meaning, to be read the owner's  
8 manual.

9 Q. Okay. Next one?

10 A. The next one is -- it's a blue circle encasing in a white  
11 color personal protective equipment that includes safety  
12 goggles, hearing protection and a helmet. The next one across  
13 is a red triangle surrounding what is on the left side inside  
14 the bottom part of the triangle presumably a spinning cut-off  
15 saw blade that is spewing debris and sparks indicating that  
16 that could ignite flammable material as indicated by the part  
17 of the icon indicating a flame as a symbol.

18 Q. Okay.

19 A. The next one is the prohibition against using a damaged or  
20 cracked authorized blade. It has the circle slash symbol  
21 through it. And the last one is a red triangle encasing a  
22 person presumably breathing in dangerous fumes, indicating  
23 that that is a hazard.

24 Q. Now, when you reached the conclusion you addressed a  
25 moment ago that based on the -- I think you said website

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1 manual, deposition testimony, that a pictograph of the  
2 specific hazard were involved with here, toothed blades belong  
3 on the saw, did you consider the relative hazard level of the  
4 -- represented by the pictographs on there vis-a-vis that one  
5 you have testified should have been on the saw?

6 A. Yes, and I think I've already indicated that it should  
7 have been given a priority at least as high as the other ones,  
8 based on the information that we talked about just a minute  
9 ago.

10 Q. You stated on page 8 further that had such a pictograph  
11 been included on the saw -- we're just talking now about a  
12 pictograph added to the strip of pictographs that's already on  
13 there, and we've already discussed on in connection with text.  
14 Had a pictograph been included on the saw it would have been  
15 highly likely that Mr. McGee and others at Joseph Jingoli and  
16 Sons would have been aware of the prohibition preventing this  
17 accident. On what did you base that?

18 A. There are actually several parts to this. The pictograph  
19 and the warning aren't just for Mr. McGee, it's for anybody  
20 that's going to come into contact with it. And so if the  
21 warning had been adequate, I believe it would have alerted if  
22 not Mr. McGee, somebody in the chain that would have passed  
23 the word along that this is a prohibited and dangerous use.

24 Q. Is there anything in the warnings literature or warnings  
25 research that addresses the issue of pictographs and their

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1 effectiveness?

2 A. Sure. There are studies that show that pictographs are  
3 effective at getting people to notice information, to encode  
4 that information, and there's at least a study or two that  
5 suggests that they can have an effect on compliance. For  
6 example --

7 Q. Go ahead.

8 A. You want me to go on?

9 Q. Yeah.

10 A. Although, again, and I suppose we'll get to this some  
11 point, although compliance studies are sometimes challenging  
12 to do, there's at least one study that I know of that suggests  
13 that pictograms can be effective in achieving compliance with  
14 a warning directive.

15 Q. Does it suggest that or state it?

16 A. It states that. The results of the experiment state that.

17 Q. Now, does a pictograph have any different role than text  
18 in the function of reminding?

19 A. Sure. It can remind people at a time when they're about  
20 to become involved with or be exposed to the hazard. It can  
21 also be useful for indicating hazards to people who may not be  
22 English speaking, if that's the only language that textual  
23 information is written into. Or people who may be not well  
24 educated.

25 Q. Okay. I take it a textual warning requires some

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1 determination on the viewer's part to focus on it and read it?

2 A. Yes.

3 Q. Does a pictogram have that same component?

4 A. No, they're designed -- they're actually designed to be  
5 recognizable instantaneously to communicate a message.

6 Q. Now, then the other one we mentioned just a moment ago is  
7 the general admonition in that little textual label that's in  
8 the lower right on that side, and the open book pictogram to  
9 follow the safety precautions in the owner's manual. And you  
10 have indicated in your report on page 9 --

11 THE COURT: Go ahead.

12 BY MR. PACKIN:

13 Q. -- that it is foreseeable that users of the TS 400 may not  
14 have access to the owner's manual as they are not often the  
15 owners. Without necessarily repeating anything we've covered  
16 earlier today, on what did you base that determination?

17 A. Well, again, I say some of it in my opinion, that because  
18 this is intended primarily to be used by people working in  
19 construction, then it's reasonable to assume that the people  
20 who will actually use those won't be the purchasers or people  
21 who perform the maintenance on them, and so it's reasonable to  
22 expect that they may not access to an owner's manual, or even  
23 if they did, given that people are busy, they probably work  
24 with a variety of tools, that they may not read the manual  
25 completely or they may not remember the information that they

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1 read at a point in time when they're confronted with the  
2 hazard. So that's why it's important to have on-product  
3 information.

4 Q. Are those issues or limitations, my word, in the  
5 communication function of manuals recognized anywhere in the  
6 warnings literature, safety communication literature?

7 A. I'm not sure what you're asking me, sir.

8 Q. In other words, you've indicated that with some products,  
9 a manual is not likely to get to the end user.

10 A. Right.

11 Q. Or the end user may not likely have time to read it. Has  
12 that been recognized or discussed in the warnings literature?

13 A. Yes, that it's important to have on-product labels for  
14 that specific reason.

15 Q. Okay. And is that importance different between consumer  
16 products where the purchaser is the owner versus commercial  
17 products where the purchaser may not, in fact, likely be the  
18 owner? I mean, in other words, the purchaser may not actually  
19 be the user.

20 A. Yes, if someone purchases a consumer product, for example,  
21 some of the tools that I have, I buy it with the owner's  
22 manual and I'm able to keep that and read it myself.

23 Q. And in your experience, how many owner's manuals generally  
24 come with a product?

25 A. Typically one.

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1 Q. All right. From the testimony in this case, how many  
2 owner's manuals came with the TS 400?

3 A. One manual.

4 Q. You indicate on page 9 that even if the user was given  
5 access to the TS 400 manual, he or she would not likely be  
6 provided by the employer with time to read it. On what did  
7 you base that?

8 A. Because if they were to take the time to read every manual  
9 with every piece of equipment that they had, it's unlikely  
10 that they would get anything done.

11 Q. Now, in this case, the owner's manual for the TS 400, I  
12 think we can stipulate, the end of the English portion is 43  
13 pages, was that consistent with your reading of the manual?  
14 Or without having to commit to 43 exactly, close to it?

15 A. I think close to it, I --

16 THE COURT: So the manual is 43 pages long in  
17 English, yes?

18 MR. PACKIN: Correct.

19 BY MR. PACKIN:

20 Q. Then there's an additional section in Spanish, but some 43  
21 pages, correct?

22 A. That sounds about right. I'll assume that you're correct  
23 because you have it in front of you.

24 Q. Now, in discussing that issue, you stated in that page 9  
25 that even if the manual was provided to a user of a tool such

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1 as this and was read cover to cover, that issues such as --  
2 there would be issues such as how long the information was  
3 retained. What do you base that on and is there any support  
4 for that in warning science?

5 A. Well, there's support for that not just in warning  
6 science, but it's a basic generally accepted principle in  
7 psychology that people can't retain a lot of information that  
8 they've read over a large period of time without repeated  
9 interaction with it and so on.

10 Q. Okay. You state in that same page that if it is assumed  
11 that the user of a tool such as this was provided with the  
12 manual and provided with the opportunity to read the manual,  
13 that one would have to assume that the user would be provided  
14 with manuals for all the tools at that workplace and read all  
15 the manuals. What do you base that on?

16 A. Well, it's just a reasonable real-life kind of an  
17 expectation that if this poses a danger, there are arguably  
18 other pieces of equipment that are going to be used at a  
19 construction site that also have hazards associated with them.

20 Q. Would your experience indicate that construction workers  
21 typically would be provided with and be reading all these  
22 different manuals for all these different tools?

23 A. I don't think that that would be a reasonable expectation  
24 under any circumstances.

25 Q. Okay. Based upon all of what we've discussed so far in

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1 the record and what's contained in your report that's been  
2 marked in evidence for purposes of this hearing, are these  
3 both the factual bases and the bases in warning science  
4 literature and the standards on which you reached the  
5 conclusion that the labeling on the product was defective --

6 A. Yes.

7 Q. -- in this case? You state on page 5 --

8 THE COURT: So 10 is -- page 10 is now moot, right?

9 MR. PACKIN: Largely so, yes.

10 THE COURT: Okay. I'll be right with you.

11 MR. PACKIN: Yes, Ma'am.

12 THE COURT: Back to page 5, okay.

13 BY MR. PACKIN:

14 Q. You state on page 5 the opinion that if the on-product  
15 labeling on the TS 400 had been adequate, it is reasonable to  
16 expect that at least one of the many people at Joseph Jingoli  
17 and Sons would have been aware that this configuration,  
18 meaning a wood cutting toothed blade on this machine, was  
19 unauthorized and dangerous and the practice would have been  
20 prohibited. On what do you base that conclusion?

21 A. Can you show -- again, I'm having a hard time keeping up  
22 with where you're jumping around to, if you don't mind.

23 Q. Page 5 --

24 A. Yes.

25 Q. -- the second full paragraph. Second block of writing.

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1 It's the second sentence in that paragraph.

2 A. Yes, because there were so many people that had interacted  
3 with that, from the time they got it in the shop, there were  
4 people that were putting them together, repairing them and so  
5 on that would have come into contact with that label. There  
6 were people that were using them. It's likely that somebody  
7 would have seen that, and assuming that people don't have a  
8 death wish, then they would probably have read it and passed  
9 that information along if it wasn't for themselves.

10 Q. All right, now even after Mr. McGee was injured, the very  
11 morning that that accident happened when he was struck in the  
12 face and sustained the injuries that we've seen, from your  
13 review of the materials, was the cut in the pipe that he was  
14 cutting at the time of the accident completely by another co-  
15 worker?

16 A. Yes, I believe Steve Caldwell took the same saw with the  
17 same blade and finished the cut following the accident.

18 Q. Okay. So the materials you reviewed indicated that even  
19 after the accident, Mr. Caldwell, moments later relatively  
20 speaking, finished the cut with the same machine with the same  
21 blade on it, correct?

22 A. Yes.

23 Q. In his deposition testimony, did he indicate that after  
24 Mr. McGee's accident that he realized that the issue here had  
25 been that there was a toothed blade on the machine and that

1 shouldn't be?

2 A. Yes, that's consistent with the deposition testimony of a  
3 lot of the individuals that, until the accident they were  
4 largely unaware that it was a prohibited use.

5 Q. Well, what I'm asking you is even after the accident that  
6 day, did he realize that it was an unauthorized and dangerous  
7 use?

8 A. No.

9 Q. And on page 5, you say that this lack of notice of the  
10 admonition on the label or the on-product labeling provides  
11 clear and converging evidence of the inadequacy of the on-  
12 product labeling. What did you mean by that, what did you  
13 base that on?

14 A. Well, the fact that both in the Stout case and the McGee  
15 case, the fact that none of the workers that were using the  
16 saw appeared to understand that it was an unauthorized use  
17 converges on the fact that the warning did not achieve its  
18 job, which is conveying the hazards associated with the  
19 inappropriate use of a toothed saw blade on the saw.

20 Q. And again, that was used, you said before, by you as  
21 corroboration, not as the basis for your conclusion, correct?

22 A. That's correct.

23 Q. Going to page 4 and a different subject but one we've  
24 touched upon briefly. You say Stihl had available a DVD --

25 THE COURT: Page? Sorry.

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1 MR. PACKIN: I'm sorry, I'm sorry, Your Honor, 4.  
2 And I'm going to move the machine so that it's not in the  
3 witness' way at the moment.

4 THE COURT: Could I just have an update on your  
5 estimated timing?

6 MR. PACKIN: Maybe a half an hour.

7 THE COURT: Five minutes now.

8 MR. PACKIN: Okay, thank you, Your Honor.

9 (Court in recess)

10 THE COURT: We're going to make it today.

11 MR. PACKIN: Thank you, Your Honor. We already had  
12 some discussion earlier today about the DVD issue, I don't  
13 want to repeat that, I just have a few additional questions.

14 DIRECT EXAMINATION (CONT'D)

15 BY MR. PACKIN:

16 Q. You stated on page 4 of your report that Stihl had  
17 available a DVD demonstrating safe operation of the TS 400 at  
18 the time it was manufactured. I want you to assume  
19 hypothetically that if Stihl didn't have such a DVD at that  
20 time, was such a DVD makeable, could it have been made, did  
21 the technology exist?

22 MR. WALSH: Objection, Your Honor, outside the scope  
23 of the report.

24 THE COURT: I don't think we need that background.

25 MR. PACKIN: Okay.

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1 THE COURT: So this DVD was available as an  
2 accessory for \$5 and it shows how to use the machine?

3 MR. PACKIN: Right. You watch --

4 THE COURT: Is that right?

5 MR. PACKIN: Yes, Ma'am.

6 THE COURT: Sir?

7 A. I'm sorry?

8 THE COURT: Is that right?

9 A. Yes.

10 BY MR. PACKIN:

11 Q. Now, you've indicated that you've watched the DVD,  
12 correct?

13 A. Yes.

14 Q. Okay. And you've indicated it shows how to operate it,  
15 correct?

16 A. Yes.

17 Q. Does it address safety issues?

18 A. Yes.

19 Q. Does it address the safety issue of the use of wood  
20 cutting blades?

21 A. Yes.

22 Q. Does it address the safety issue of kickback?

23 A. Yes.

24 Q. You indicate on page 4 that because of the importance of  
25 the DVD as part of a warning safety system, it should have

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1 been included as part of the materials distributed with every  
2 TS 400, the saw having a cost of \$800, correct?

3 A. Yes.

4 Q. And what do you base that on?

5 A. Well, relative to the cost of the saw, it's relatively  
6 low, and given the severity of the hazards that we're talking  
7 about today, it would be an important safety component because  
8 of some of the factors that we've talked about already, that  
9 because this is a group of construction workers that don't  
10 actually purchase the machines but are purchased and  
11 maintained by the company, they may not get access to the  
12 owner's manual for that. They're left with, then, the on-  
13 product safety information, but the DVDs certainly could be  
14 used to supplement that in a number of different ways; the  
15 users themselves could watch them, they could use that as part  
16 of training that they are doing at the construction site. It  
17 would be an easier way for people to get the information that  
18 they need.

19 Q. Also on page 4, you offer the opinion that operators of  
20 the TS 400 may reasonably assume that the wheel guard is  
21 designed to protect them against inadvertent contact with the  
22 moving blade. On what did you base that statement, that  
23 conclusion?

24 A. Because again going back to that idea of -- by the way,  
25 can you tell me where you're looking? Because sometimes I --

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1 Q. Yes.

2 A. -- can't --

3 Q. Page 4.

4 A. Yes. Oh, I see where you're at now, I'm sorry. It's the  
5 idea of an affordance, or things that might prevent you from  
6 coming into contact with a hazard. From a layperson's  
7 perspective, when you have a guard around something that's  
8 moving like that, a reasonable assumption would be that you  
9 would not come into contact with the blade where in fact the  
10 cover is covering the blade. But in fact, if you look at  
11 Stihl's owner's manual, it indicates a quite different  
12 purpose, it's to direct debris away from the operator, other  
13 people and to prevent sparks from flying.

14 Q. Okay. Now, certainly that --

15 THE COURT: You said from a layperson's perspective.  
16 What's your basis for that?

17 A. That it's going back to the idea of an affordance; that  
18 is, if something looks like it does something, people are  
19 reasonably expected to interpret it that way.

20 THE COURT: Okay, just -- the concept is what,  
21 affordance?

22 A. Affordance.

23 THE COURT: Is a concept of what?

24 A. Essentially, it means, for shorthand, is for -- so if you  
25 have a guard against something that's moving, it's sort of

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1 obvious that that will prevent you from coming into contact,  
2 in this case, with a moving blade, whether it's a composite  
3 blade, a diamond tipped blade or a toothed blade. The blade  
4 in this case is movable, and the purpose as stated in the  
5 owner's manual is to allow you to adjust it to direct the  
6 debris away from you.

7 THE COURT: So this concept of affordance is the  
8 concept that conveys to the subject that something that looks  
9 like to be for something is what that thing is for?

10 A. That's what the person's --

11 THE COURT: I've really gotten so tongue-tied.

12 A. That's what the person's interpretation is likely to be.  
13 And if you read the owner's manual for this cut-off saw, you  
14 get a completely different idea; it's not intended for that at  
15 all, but instead, as I had said, to direct things being  
16 grinded away from the operator.

17 BY MR. PACKIN:

18 Q. Now, certainly to some degree the cover would prevent  
19 access to certain parts of the rotating blade, correct?

20 A. Yes.

21 Q. So what your indicating is the manual indicates that the  
22 primary function is not that, however.

23 A. Yes.

24 Q. You state on page 4 that Stihl should have expressly  
25 addressed that issue, that the wheel guard is not designed to

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1 protect against inadvertent blade contact in the manual and  
2 the on-product warnings. On what did you base that  
3 conclusion?

4 A. Well, to offset misbeliefs that are likely to happen  
5 because of the reasons I just described.

6 Q. Now, these various opinions, without -- withdrawn. These  
7 various concepts that you've discussed throughout the day,  
8 conspicuity, size, location, color, pictographs, use of  
9 different media to convey warnings, affordance, benign  
10 experience, all those -- and I'm sure I left some out. Any of  
11 those concepts, any of those theories that you relied on in  
12 this case or employed in this case, are there any that have  
13 not been published in the warnings and human factors  
14 literature in peer review form?

15 A. No, all of these concepts have been presented in one form  
16 or another, and they're certainly encapsulated in higher level  
17 summary books such as the ones I brought today.

18 Q. And I believe you had indicated some of them have actually  
19 been put into standard form by ANSI in various aspects of the  
20 Z535 series that you've testified to, correct?

21 A. Right, and we've already talked about those, so I hesitate  
22 to re-plow that ground.

23 Q. And we don't want to. Is any warning optimal, meaning  
24 100% successful all the time with all users in all situations?

25 A. No, that would be too large of a burden on something that

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1 really is intended to persuade people, and if we look at it in  
2 the context of where it fits, there's a well known safety  
3 hierarchy called the hazard control hierarchy, among other  
4 things, that suggests that the first step in addressing --

5 Q. Suggests or states?

6 A. States that with respect to eliminating hazards from a  
7 piece of equipment or a product, the first approach, or the  
8 first line of approach, is to design the hazards out or if an  
9 alternative or a reasonable substitute is available, to do so.  
10 If there's still residual hazards after that process has taken  
11 place, then to provide guarding, either a physical guard or  
12 sometimes metaphorical in terms of administrative controls  
13 that can be put into place. Warning's a really third line of  
14 defense to warn about residual hazards that haven't been  
15 eliminated from the product or system through those first two  
16 approaches.

17 Q. Okay.

18 A. And so with that sort of as setting the basis for the  
19 answer to your questions then, because warnings are intended  
20 to persuade people, and you're dealing with human behavior,  
21 human cognition, the fact that none of us are perfect, it  
22 can't be expected to be 100% effective under any  
23 circumstances.

24 Q. Have you, at any time, advocated in this case that Stihl's  
25 warnings had to be perfect or optimal?

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1 A. No.

2 Q. These various different theories and concepts that you've  
3 discussed today that I enumerated a few moments ago, have they  
4 received general acceptance in the scientific community that  
5 deals with warnings and risk communication?

6 A. Yes.

7 THE COURT: You've already asked that.

8 MR. PACKIN: Okay. I'm sorry.

9 THE COURT: If you're talking about these concepts,  
10 you asked that. Unless you want to add the words, "generally  
11 accepted."

12 MR. PACKIN: That's where I was going, yes.

13 BY MR. PACKIN:

14 Q. So we know they've been peer reviewed published, ANSI Z535  
15 contains many of them, and based on your involvement in this  
16 field, have they received general acceptance --

17 A. Yes.

18 Q. -- in the warnings and risk communication community?

19 A. Yes.

20 Q. Now, by general acceptance, do you mean that every author,  
21 every authority in warnings and risk communication agrees with  
22 every one of these concepts and theories?

23 A. No, there are debates on many issues within the empirical  
24 literature on warnings or people that investigate warnings and  
25 risk communication.

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1 Q. Certain theories, though, or concepts ultimately over time  
2 reach general acceptance in the community?

3 A. Yes. I mean, some examples are that the concept of benign  
4 experience, I can't remember anybody wanting to debate that  
5 that, in fact, exists. Or the idea that cost of compliance  
6 tends to blunt the effectiveness of a warning, I can't  
7 remember the last time I heard somebody say that that wasn't  
8 well accepted or generally accepted within the risk  
9 communication warnings audience.

10 Q. Does the fact that some authors might have disagreement  
11 with some aspects of some theories in a given science mean  
12 that they're not generally accepted?

13 A. No, because the goal is to always move the ball forward in  
14 any area of science, and so is true of the area of warnings  
15 and risk communication.

16 Q. And how does the ball get moved forward? What kinds of  
17 dialogue or debate causes that to happen?

18 A. Right. Any study that's done, including mine, they're  
19 calculated to do just a few things; that's enough to try and  
20 accomplish in one study. Any study that you do usually leaves  
21 questions, right? Sometimes it leads to a lot of different  
22 questions that then the next set of studies will take up. And  
23 as these studies accumulate over time, that's what leads to  
24 general acceptance of certain concepts with any scientific  
25 discipline.

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1 Q. Does your discipline of warnings and risk communication  
2 welcome dialogue, debate, articles that analyze or questions  
3 certain aspects of what is or what has been generally  
4 accepted?

5 A. Absolutely. We see each other regularly, at least once  
6 every year at the Human Factors and Ergonomics Society, where  
7 we all attend similar papers, and we have discussions about  
8 this all the time.

9 Q. There was a warnings expert offered in this case by Oldham  
10 when they were in it, and Mr. Timothy Rhoades, do you know Mr.  
11 Rhoades?

12 A. Yes.

13 Q. How do you know him?

14 A. I know Mr. Rhoades --

15 THE COURT: Can you just spell that for me please?

16 MR. PACKIN: R-H-O-D-E-S.

17 A. R-H-O-A-D --

18 MR. PACKIN: Sorry.

19 A. -- E-S. I know Tim first from our both attending the  
20 annual meeting of the Human Factors and Ergonomics Society,  
21 but I also know him from my role on the ANSI Z535 Committee.

22 BY MR. PACKIN:

23 Q. Okay. There is a individual who performed some testing on  
24 candidate warnings that you prepared in this case, a Mr.  
25 Doris, do you know him?

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1 A. Yes, I know Nathan Dorris.

2 Q. How do you know him?

3 A. Again, I know Nathan primarily from our -- from us both  
4 sitting on the Z535 Committee, but I see him from time to time  
5 at the annual meeting of the Human Factors and Ergonomics  
6 Society as well.

7 Q. Stihl has put forward as an expert in this case a Jane  
8 Welch. Do you know Ms. Welch?

9 A. I do not know Ms. Welch -- Dr. Welch.

10 Q. Have you ever seen her at a Human Factors and Ergonomics  
11 Society meeting?

12 A. Not to my knowledge.

13 Q. Have you ever seen anything she's published in the  
14 warnings literature?

15 A. No.

16 Q. Have you ever heard her name referenced by any of your  
17 colleagues in the field of warnings?

18 A. No, not until this litigation. I hadn't heard of her  
19 until this litigation.

20 Q. Okay. There's an individual that has rendered some  
21 opinions regarding warnings by Stihl, a Vincent Morabit. Have  
22 you ever heard of Mr. Morabit?

23 THE COURT: Spell his name.

24 MR. PACKIN: M-O-R-A-B-I-T.

25 MR. WALSH: Your Honor, I'm not sure what any of

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1 this questioning has to do with a Daubert Hearing, considering  
2 the credentials and work of this witness. This seems far, far  
3 afield.

4 MR. PACKIN: Your Honor, the line of questioning was  
5 started because -- to indicate that there is a limited group  
6 of people who have worked extensively in this field, and this  
7 witness is familiar with virtually all of them.

8 MR. WALSH: Well, if that's the goal, that certainly  
9 is a strange way of getting to it, by asking questions about  
10 specific individuals that have appeared in this case. And  
11 what --

12 THE COURT: Okay, look, I think we don't need this  
13 any further. Thank you.

14 MR. PACKIN: Thank you, Your Honor.

15 THE COURT: So the objection is sustained, but the  
16 testimony stands.

17 MR. PACKIN: Thank you, Your Honor.

18 BY MR. PACKIN:

19 Q. Does the fact that Mr. McGee had approximately 13 years  
20 experience in the construction trades at the time of his  
21 accident have any bearing on the analysis in this case, or how  
22 does that factor into the analysis in this case?

23 A. Well, it's not just his experience, but also the  
24 experience of his co-workers; they'd all been working in and  
25 around the construction trades for may years, and by his

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1 testimony and other testimony, they had had significant  
2 experience with the cut-off saw and many other kinds of power  
3 tools and so on.

4 Q. And how did that factor in here? I mean, if the gentleman  
5 has 13 years of experience and thought he knew how to use a  
6 cut-off saw safely, how, if at all, does that factor in?

7 A. Well, it corroborates some of the other testimony that  
8 I've given today that it was the misuse, the placement of  
9 toothed blades on the saw, was a misuse that was known to  
10 Stihl representatives, and they've known to be a common and  
11 dangerous misuse of that. That analysis also suggests that  
12 because, again, of the concept of an affordance, where a  
13 toothed blade can fit on the saw, just as the recommended  
14 blades, which are the composite blade, and the diamond tip  
15 blade, sometimes with the assistance of a reducing pusher --  
16 reducer pushing, which would give a person without the  
17 information that it's prohibited the idea that in fact you can  
18 put that on there. So it's corroboration that that's what I  
19 would expect with a person who had used the saw in that  
20 capacity, even though he had mounted it with a prohibited  
21 blade, if he never experienced the kind of injury that he did  
22 as a function of this accident. It's not surprising to me,  
23 and it's explained by the concept of benign experience.

24 Q. Okay, and that concept, benign experience, meaning  
25 experience with a product that has benign -- explain it for us

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1 please, I don't want to --

2 A. Yes. Benign experience, it's also tied to well known  
3 concepts in a related discipline of behavioral psychology that  
4 I talked about earlier, and it suggests that we all learn in  
5 our life as a function of certainly the information that we  
6 get, and we also learn based on consequences, operant  
7 psychology, and it goes back to the early 1900s in terms of  
8 all of the research that was done to support those  
9 contentions. You know it as a parent, you know in your own  
10 life that we learn based on consequences. If the consequences  
11 for having used a piece of equipment like this with a  
12 prohibited blade is that I get the job done more efficiently.  
13 So, for example the facts of the case in this suggest that  
14 they found that they could cut through certain materials very  
15 quickly --

16 Q. Suggests or states, sir?

17 A. State that they indicated that they could cut through  
18 different kinds of material. In this case, it was high  
19 density polypropylene piping that was different from their  
20 experience with using a composite blade, which had some  
21 problems. They suggested that it melted it and caused other  
22 problems. So it's not surprising, when you add up the  
23 confluence of factors in this case, that even a person that  
24 had many years of experience would actually exacerbate the  
25 problem because he had gone for so many years not knowing that

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1 this was a prohibited use and probably didn't think about it  
2 would make him less likely to look for information, whether  
3 it's in an owner's manual or an on-product warning.

4 Q. You're not a mechanical engineer, correct?

5 A. No.

6 Q. You have no training in mechanical engineering, is that  
7 correct?

8 A. No.

9 Q. When you said no --

10 A. It's correct --

11 Q. Okay.

12 A. -- that I don't have any training in mechanical  
13 engineering.

14 Q. Did the fact that you are not a mechanical engineer and  
15 don't have training in engineering affect or impair in any way  
16 your ability to perform the warnings analysis that you  
17 performed in this case?

18 A. No.

19 Q. Why is that, sir?

20 A. Because my focus is on risk communications and warnings.  
21 Much of the information pertaining to the specific operational  
22 characteristics of this machine were provided to me in the  
23 many depositions of Stihl employees who were responsible for  
24 the design development of the warnings, from the many  
25 individuals who used the equipment and so on, from the owner's

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1 manual that I read, from the DVD, from the website, from the  
2 on-product and -- the warnings that were on there, my own use  
3 of a rental saw to get a handle on it, and then purchase of a  
4 saw all gave me enough information to understand that. What  
5 was at question for me wasn't that there was a hazard, that  
6 was made patently clear from the Stihl employees themselves,  
7 Mr. Linsbauer and Mr. Elsner indicated they knew that this was  
8 a dangerous misuse of the saw. So the question was whether or  
9 not the warnings that were designed to address that hazard  
10 were adequate.

11 Q. Now, also is it correct you have no particular background  
12 in construction trades yourself personally?

13 A. No.

14 Q. Correct?

15 A. That's correct.

16 Q. Or, other than your home use, in the use of commercial  
17 power tools, is that correct?

18 A. That's correct.

19 Q. Did that make any difference in your analysis of the  
20 warnings and warning systems in this case?

21 A. No.

22 Q. And for what reasons? And if they should be the same as  
23 the reasons pertaining to the engineering, you don't need to  
24 repeat that per se.

25 MR. WALSH: Your Honor, I'm going to object to this

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1 witness being asked to self-aggrandize his work. He's not an  
2 engineer, he admits that. He has never worked in  
3 construction, he admits that. How that may have influenced  
4 what he could or could not do I suggest is not for him to say,  
5 and it serves little purpose having the witness say even  
6 though I'm not qualified in these areas, in my opinion it did  
7 not affect what I was able to do.

8 THE COURT: I think this is just a series of wrap-up  
9 questions. I think we're almost finished.

10 MR. PACKIN: Right, and designed to direct some of  
11 the very issues that the Defense has raised as well.

12 THE COURT: You mean to anticipate some of the cross  
13 and deal with it at least up front?

14 MR. PACKIN: Right, and we'd be ignoring the  
15 elephant in the living room if we didn't know some of the  
16 issues that were raised in their papers and --

17 THE COURT: Well, we're going to hear about that  
18 from them. So overruled, but let's just move along. The fact  
19 that you don't have experience in construction work does not  
20 impair your ability to opine as to warnings in this case, is  
21 that your view, sir?

22 A. Yes.

23 THE COURT: Okay. Next.

24 BY MR. PACKIN:

25 Q. Have you ever seen a cut-off saw being used?

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1 A. I think I've stated in my testimony that before this case,  
2 I hadn't seen one used until I'd looked at the DVD, I operated  
3 it myself. After that I remember testifying at one of the  
4 depositions, and I don't remember whether it was Stout or this  
5 case, that I had seen somebody in Troy, New York using one to  
6 cut the asphalt on a road near RPI.

7 Q. Okay. Did you, prior to rendering your opinions in this  
8 case, do whatever factual research you felt you needed to do  
9 to familiarize yourself with the use and operation of a cut-  
10 off saw?

11 A. Yes.

12 Q. Would you have written the opinions in the analysis you  
13 performed in this case had you not done so?

14 A. No.

15 Q. Do you -- from the materials that you had available in  
16 this and the Stout case, did you become aware in fact of how  
17 cut-off saws are used?

18 A. I couldn't say that I know what all the uses are, but I  
19 became familiar with some of the uses based on my reading  
20 materials in the case, and then looking at the materials that  
21 I've already talked about in terms of the DVD and so on, and  
22 reading the owner's manual.

23 THE COURT: So you don't know -- you wouldn't know  
24 how to take it and attack your driveway with it?

25 A. I probably could at this point because of all of the

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1 information I've gleaned from it, but I wouldn't say that I'm  
2 a trained user of --

3 THE COURT: Physically, no, you haven't done it?

4 A. Physically, no, I haven't done it, right.

5 BY MR. PACKIN:

6 Q. From the review of the materials in this case, did you  
7 become aware of the environments in which these tools are  
8 used?

9 A. Again, not all environments, but yes, I became aware of  
10 some of the environments.

11 Q. Would you have any way to determine how often cut-off saws  
12 are used in the United States, is that a knowable piece of  
13 information?

14 A. I don't know how anyone would know that.

15 Q. Are you aware of the existence of accident statistics that  
16 are specific to cut-off saws?

17 A. No.

18 Q. Are you aware of the existence of accident statistics  
19 specific to kickback injuries resulting from cut-off saws?

20 A. No.

21 Q. Were such statistics to exist, would they have any impact  
22 upon your analysis and opinions in this case regarding the  
23 adequacy of Stihl's warnings?

24 A. No, because the information that I needed to start with  
25 was provided by the Stihl representatives themselves. They

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1 had identified this as a hazard that was dangerous, that could  
2 result in severe consequences. It was evident there, it was  
3 evident in their owner's manual, given all the warnings that  
4 they had for the kickback hazard for the material that we find  
5 on the saw, and the material presented in the DVD.

6 Q. Okay, and going to that, you mentioned earlier today that  
7 that provided -- and if I'm misstating it, please feel free to  
8 restate your --

9 THE COURT: Counsel, this is becoming repetitive and  
10 it would be fine if we just see what the cross brings and then  
11 you can do a little redirect.

12 MR. PACKIN: But there are a few topics, Your Honor,  
13 I do wish to address briefly, very briefly.

14 BY MR. PACKIN:

15 Q. You didn't perform a formal hazard analysis, correct, in  
16 this case?

17 A. No.

18 Q. Correct?

19 A. That's correct.

20 Q. Why not?

21 A. Again, because I had been provided with the information  
22 that a hazard analysis is usually calculated to yield. There  
23 are a number of different approaches to hazard analysis,  
24 they're all typically designed to determine what the residual  
25 hazards are associated with a product or piece of equipment

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1 after the process that we've talked about has been undertaken;  
2 that is, engineering people should do what they can to do to  
3 design out the hazards if there are any residual hazards, to  
4 do the guarding and so on. So the hazard analysis, for me,  
5 was partially done by Stihl itself by indicating that this, in  
6 fact, was a serious hazard that could have very serious  
7 consequences, including serious injury or death.

8 Q. Have you been involved in cases where hazard analysis is  
9 at issue where a manufacturer says this is not something that  
10 needed to be warned against?

11 THE COURT: Move on, Counsel.

12 A. It's possible --

13 MR. PACKIN: Okay.

14 A. -- as I'm sitting here --

15 THE COURT: No, no --

16 A. -- I can't think of a specific example.

17 THE COURT: -- don't answer.

18 BY MR. PACKIN:

19 Q. You haven't spoken to either Mr. McGee or Mr. Stout  
20 directly, is that correct?

21 A. That's correct.

22 Q. Do you feel there was a need to do that in this case?

23 A. No, I had ample opportunity to look at the complete  
24 deposition of Mr. McGee and Mr. Stout in that case, and the  
25 co-workers around them provided me with quite a lot of

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1 detailed information about them.

2 Q. Did you review warnings on any other cut-off saws that  
3 were manufactured in or around 2003?

4 A. I think I've already testified that I have taken a look at  
5 them at various websites, and I had looked at photographs  
6 provided by Mr. Growney of various kinds of cut-off saws and  
7 some warnings.

8 Q. Would the warnings given by other manufacturers of cut-off  
9 saws have any bearing on your determination as to whether the  
10 Stihl warning system was adequate or not adequate?

11 A. No.

12 Q. Why is that?

13 A. Well, partly what I looked at the pictures for was to find  
14 out the actual design characteristics of the different saws to  
15 see where warnings could be located, not necessarily their  
16 operating characteristics since that's not my expertise. But  
17 more to the point as it relates to warnings, my evaluation  
18 would be comparing this specific warning system against the  
19 criteria that I've stated earlier, which is abiding to ANSI  
20 Z535 and also in the warnings literature to determine whether  
21 or not it met the criteria for effectiveness or for adequacy.

22 Q. Just briefly, sir, why did you prepare candidate warnings  
23 in this case?

24 A. I was asked to.

25 Q. By whom?

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1 A. Mr. Walsh at one of the depositions in the first case.

2 MR. WALSH: Objection, Your Honor, that grossly  
3 misstates the record. The --

4 THE COURT: Okay, please don't interrupt the  
5 witness. Sorry.

6 MR. PACKIN: Thank you, Your Honor.

7 THE COURT: He's going to give his answer. He  
8 prepared candidate warnings in the Stout case, is that what  
9 you're saying, sir?

10 A. I was asked to go into a room outside where I was being  
11 deposed after --

12 THE COURT: In the Stout case?

13 A. In the Stout case, after strenuous objection to that,  
14 stating that to do so would be unprofessional because it's not  
15 how I would approach developing a warning, to sit in a room  
16 with pencils and a piece of paper. And to do that I was told  
17 that I had to do it for this case, and so I struggled with  
18 that the best I could for a couple of hours, after which there  
19 was some arguments and I was called back to the next  
20 deposition. During the intervening time, I thought that what  
21 Mr. Walsh was looking for was what I would actually do to  
22 prepare my idea of what a prototype or candidate warning would  
23 be, and I brought those back with me to the subsequent  
24 deposition in that case.

25 BY MR. PACKIN:

Kalsher - Direct

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1 Q. Dr. Kalsher, were those candidate warnings ever intended  
2 by you to be final end products of what you would put on a  
3 cut-off saw?

4 A. No. Again, I was asked -- and I want to make sure that  
5 I'm accurately stating what the record is is that I was asked  
6 to draw what I would see, and I took that to mean that they  
7 wanted my best effort. And so I developed what would be  
8 reasonable candidates based on an evaluation of that to what  
9 I've been suggesting for the warnings in this case, which is  
10 the Z535 criteria and what I know from literature on warnings  
11 and risk communication.

12 Q. And have you ever performed any actual statistical testing  
13 of those warnings?

14 A. No.

15 Q. And why is that?

16 A. I haven't been asked to do that. In fact, I was asked to  
17 stop doing any work on those.

18 Q. Okay. By whom? Who were you told to stop doing work by?

19 A. I thought I was -- that you had indicated to me that the  
20 Judge in the case had told me to stop any further work on  
21 them. Am I misunderstanding that?

22 Q. Would you test them before they got into a form where you  
23 were considering -- strike that, withdrawn.

24 (Pause in proceedings)

25 MR. PACKIN: If I may have one more moment, Your

1 Honor, I think I may be finished.

2 THE COURT: Look it over.

3 (Pause in proceedings)

4 MR. PACKIN: That's all I have. Thank you, Dr.  
5 Kalsher. Thank you, Your Honor.

6 THE COURT: Thank you everyone. I especially want  
7 to thank everyone for making the extreme sacrifice of agreeing  
8 to continue tomorrow rather than breaking. So we are done for  
9 today. If counsel would just join me at the side, I had a  
10 question about one document.

11 MR. KALSHER: Do you need me to leave?

12 THE COURT: You may step down, watch your step  
13 please. This is off the record.

14 (Off the record discussion)

15 (Court adjourned)

16

17 CERTIFICATION

18 I certify that the foregoing is a correct transcript from the  
19 electronic sound recording of the proceedings in the above-  
20 entitled matter.

21

22 S/Lewis Parham

5/4/12

23

24 Signature of Transcriber

Date